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ONTARIO LABOUR RELATIONS BOARD REPORTS

October 1986




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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

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EDITOR: COLLEEN EDWARDS

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
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MR. GROCER, WILLETT FOODS LIMITED, C.O.B. AS, DOMGROUP LTD., HOLLINGER INC., CONRAD BLACK, ET AL.; RE R.W.D.S.U., LOCAL 414; RE TERMARG FOOD SERVICES LIMITED, ET AL.

1364

1223-86-FCA Toronto Typographical Union, Local 91, Applicant, v. Burlington Northern Air Freight (Canada) Ltd., Respondent

First Contract Arbitration - Interest Arbitration - Provision of detailed reasons concerning matters in dispute circumscribed by statutory time limits - Board setting out general considerations in reaching terms to be included in a first collective agreement

BEFORE: *Robert D. Howe*, Vice-Chairman, and Board Members *I. M. Stamp* and *B. L. Armstrong*.

APPEARANCES: *Nelson Roland*, *Susan Bazilli* and *Joe Bigeau* for the applicant; *D. Brisbin* and *Wm. E. Machika* for the respondent.

DECISION OF THE BOARD; October 1, 1986

1. In a unanimous decision dated July 10, 1986 in File No. 0819-86-FC, this panel of the Board directed the settlement of a first collective agreement between the applicant and the respondent, pursuant to section 40a(2) of the *Labour Relations Act*.

2. On July 17, 1986, the parties, pursuant to section 40a(4) of the Act, gave written notice to the Board of their agreement that the Board arbitrate the settlement of the first collective agreement. That agreement was conditional on the writer being assigned to chair the arbitration panel. The parties further agreed in writing to extend the section 40a(4)(a) twenty-one day time limit in order to accommodate that assignment. They also requested that Board Members I. M. Stamp and B. L. Armstrong be assigned to the panel if possible.

3. At the hearing of this matter on August 25, 1986, the parties advised us that they were in agreement that, subject to their respective submissions as to relevance and weight, the evidence and submissions presented before this panel of the Board in File Nos. 0037-85-U, 0039-85-OH, 0446-85-U, and 0819-86-FC, could be applied to the instant application to assist us in arbitrating the first collective agreement.

4. We do not propose to provide a detailed rationale concerning our determination of the matters in dispute between the parties. The statutorily imposed forty-five day time limit for that determination militates against the provision of detailed reasons. Moreover, such reasons would be of little assistance to other panels of the Board or to members of the labour relations community as, insofar as is possible, each first contract arbitrated under section 40a must be tailored to meet the needs of the parties to that agreement and to reflect the circumstances in which it is to operate. Thus, the absence of detailed reasons for our conclusions as to particular items in dispute between the parties is intended to minimize the danger that this decision will be mistakenly viewed as having established general standards concerning what should be included in all first collective agreements which are arbitrated under section 40a. However, since this is one of the Board's first decisions under section 40a(4), we find it appropriate to set forth some general considerations which we have found to be of some assistance in fulfilling our mandate under that provision. Whether those considerations will also be of assistance in future cases involving other parties and circumstances is a matter which must await future decision.

5. In commenting on the components to be included in a first collective agreement under British Columbia's first contract legislation, P.C. Weiler, who was at that time the Chairman of the British Columbia Labour Relations Board, wrote, in part, as follows in *London Drugs Ltd.*, [1974] 1 Canadian LRBR 140, at page 147:

As regards the language and structure of the collective agreement, the Board does not believe that s. 70 should be used to achieve major breakthroughs in collective bargaining. Instead, we will try to settle on terms which reflect a fairly general consensus of what should be in a collective agreement, as tailored to the requirements of the operation before us. We will leave it to future negotiations between these parties to develop any innovations in that language. However, ...[w]e intend to see that the collective agreements we settle under s.70 are sufficiently attractive to the employees affected by them that they will think twice before applying to rid themselves of their union representatives and thus forfeiting the agreement....

6. We have adopted a somewhat similar approach in arbitrating the first collective agreement between the applicant and the respondent. We have awarded moderate wage increases which reflect the current economic and collective bargaining climate, but which also reflect the fact that the employees' wages have remained static since November of 1983. Although we have not awarded any improvement in vacation and holiday entitlement, the overall monetary cost of the contract is not insubstantial as we have extended sick leave and welfare benefits to permanent irregular employees. We have attempted to provide bargaining unit employees with some degree of job security by limiting the respondent's power to contract out work and to use part-time employees in certain circumstances, but have also sought to maintain sufficient managerial flexibility in respect of those and other matters to allow the respondent adequate scope to maintain a competitive position in the rapidly changing service industry of which it is a part.

7. Having carefully considered all of the material before us, including the oral and written submissions of the parties, we have determined that the attached document marked "Appendix" shall be the first collective agreement between the applicant and the respondent. In accordance with the legislative directive contained in section 40a(17), in arbitrating the settlement of that first collective agreement, we have accepted without amendment all of the matters agreed to by the parties in writing, including Articles 1.01, 1.02, 2.01, 2.02, 2.03, 3.03, 3.04, 4.01, 4.02, 4.03, 6.01, 6.02, 7.01, 8.01, 8.02, 8.03, 8.04, 8.05, 8.06, 8.07, 8.09, 8.11, 9.01, 9.03, 10.01, 10.02(a), (b), (c), and (d), 10.03, 12.01, 12.02, and 12.06. Much of the language contained in Articles 4.04, 4.05, 4.06, 5.01, 8.10, 10.04, 10.06, and 12.05, and in Attachment "B" - Vacations and Holidays, Attachment "C" - Sick Leave Plan, and Attachment "D" - Welfare, was also not in dispute. The same is true of portions of Attachment "A" and a number of the other provisions included in the document. In resolving the matters remaining in dispute, the Board has attempted to use language that conforms with the framework and style of the provisions to which the parties have agreed, and where suitable, has adopted language proposed by one of the parties, or blended language from their respective proposals. Although the inclusion of a mandatory membership provision was a major issue at the bargaining table, the respondent's proposed collective agreement that was filed with the Board in respect of this application (in accordance with paragraph 3(a) of Practice Note No. 19) included a provision - aptly described by counsel for the respondent as "a highly-valued 'trading item'" - requiring as a condition of employment that all employees covered by the agreement, except new employees during their probationary period, become and remain members of the union in good standing. Accordingly, that language, which parallels part of the applicant's proposal concerning union security, has been included in the collective agreement, together with other language which the Board finds to be appropriate in the circumstances of this case.

8. In conclusion, we have attempted to provide the parties with a workable first collective agreement which will enable their relationship to grow and mature. If any of the provisions which we have arbitrated (other than the term of the collective agreement) prove to be unsatisfactory, it is open to the parties to revise them by mutual consent at any time, as permitted by section 52(5) of the Act. Indeed, we would encourage the parties to meet and discuss such matters with a view to

improving their relationship, so that they will encounter fewer difficulties in their negotiations for the renewal of the first collective agreement.

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[Collective Agreement omitted: Editor]

1627-85-JD Dewar Insulations Inc., Complainant, v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, and The International Brotherhood of Painters and Allied Trades and Ontario Council of International Brotherhood of Painters and Allied Trades, Local Union 1891, Respondents

Jurisdictional Dispute - Whether complainant bound by collective agreement negotiated by the Master Insulators Association of Ontario - Scope clause on agreement covering all sectors of construction industry - Attempt by union local to negotiate separate residential agreement not an admission that agreement not applying to residential sector

BEFORE: *Harry Freedman*, Vice-Chairman, and Board Members *D. A. MacDonald* and *C. A. Ballentine*.

APPEARANCES: *Mark Contini* for the complainant; *Christine Elwell* and *Robert O. Beamish* for the International Association of Heat and Frost Insulators and Asbestos Workers, Local 95; *Maurice A. Green* for the International Brotherhood of Painters and Allied Trades and Ontario Council of International Brotherhood of Painters and Allied Trades, Local Union 1891.

DECISION OF THE BOARD; October 31, 1986

1. This is a complaint made under section 91 of the *Labour Relations Act* in respect of the assignment of work that relates to the removal of asbestos insulation from the mechanical systems at six residential apartment buildings at Regent Park in Toronto. During the course of the pre-hearing conference in this matter, it became apparent that the parties disagreed over whether the complainant was bound by the collective agreement between the Master Insulators Association of Ontario Inc. and The International Association of Heat and Frost Insulators and Asbestos Workers, and the International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 with respect to the residential sector of the construction industry. The parties agreed to have that issue determined by the Board prior to the continuation of the pre-hearing conference.

2. Ray Kurki, the manager of the Master Insulators Association of Ontario Inc. since 1981, testified that he understood that the negotiations between the parties to the collective agreement related to the industrial, commercial institutional sector of the construction industry and to maintenance work. He also explained that Local 95 had discussed establishing a residential agreement and an agreement relating to asbestos removal during negotiations.

3. Robert Beamish, the business manager of Local 95 also testified about his understanding of the scope of the collective agreement. He said that discussions about a separate residential agreement were held in order that contractors who were bound by the collective agreement in respect of the residential sector could become more competitive. He testified that those employers were bound by the collective agreement which, by its terms, applied to all sectors of the construc-

tion industry, save for the electrical power systems sector. In the absence of a separate residential agreement, the terms and conditions of employment applicable to the industrial, commercial institutional sector applied equally to the residential sector.

4. While Mr. Kurki testified about what took place at certain negotiation meetings and his understanding about the scope of the collective agreement without objection, and Mr. Beamish gave evidence about his understanding of the scope of the agreement, also without objection, in our opinion, the starting point of the determination of the issue before us is the collective agreement.

5. The recitals in the collective agreement state in part:

“WHEREAS the Association, on behalf of all Employers whose employees are represented for collective bargaining by the Union and the Union have bargained together collectively in an effort to reach a collective agreement applicable to the Industrial, Commercial and Institutional sector of the Construction Industry pursuant to the provisions of the Labour Relations Act, Revised Statutes of Ontario, 1980, Chapter 228, as amended;

AND WHEREAS the Association, *on behalf of each Employer who is a member of the Association* and any new Employer becoming a member of the Association subsequent to the date hereof, and the Union *have bargained together collectively in an effort to reach a collective agreement encompassing all sectors of the Construction Industry save and except the Electrical Power Systems sector* pursuant to the provisions of the Labour Relations Act;

• • •

AND WHEREAS the purpose of the Collective Agreement is to govern the wages and working conditions applicable to all work performed by the Employees in the application of those types of insulation which are within the jurisdiction of the Union in the Province of Ontario, provided, however, that under no circumstances shall this Agreement apply to work which is performed by employees of any Employer represented by the Association in that Employer's plant and not on a construction site.”

[emphasis added]

6. Additionally, Article 1 of the collective agreement provides in part:

“1.01 ‘Employers’ as used herein means all Employers whose employees are represented for collective bargaining by the International Association of Heat and Frost Insulators and Asbestos Workers or Local 95, thereof with respect to bargaining rights in the Industrial, Commercial and Institutional sector of the Construction Industry, *and, in addition, means members of the Association and new Employers becoming members of the Association subsequent to the date hereof*, including such other Employers as may become bound to the provisions of this Agreement pursuant to either Article 14 hereof, *with respect to all sectors of the Construction Industry save and except E.P.S.C.A.* or pursuant to the provisions of the Labour Relations Act.

1.03(a) All Employers whose employees are represented for collective bargaining by the Union recognize the Union as the sole bargaining agent for their employees performing work covered by the Agreement within the Industrial, Commercial and Institutional sector of the Construction Industry.

1.03(b) *All Employers who are members of the Association and new Employers becoming members of the association subsequent to the date hereof recognize the Union as the sole bargaining agent for their employees performing work covered by this Agreement in all sectors of the Construction Industry, save and except E.P.S.C.A.”*

[emphasis added]

7. The Master Insulators Association of Ontario Inc. is a designated employer bargaining

agency under the *Labour Relations Act*. As such, it is empowered to bargain on behalf of employers whose employees are represented in collective bargaining by Local 95, whether or not those employers are members of the Master Insulators Association of Ontario Inc. In addition, it is not disputed that the Master Insulators Association of Ontario Inc. is an employers' organization within the meaning of the *Labour Relations Act*, and that the complainant is a member of the Master Insulators Association of Ontario Inc.

8. In our opinion the first paragraph of the recital to the collective agreement and section 1.03(a) of the collective agreement relate to the role of the Master Insulators Association of Ontario Inc. as a designated employer bargaining agency.

9. There was no evidence before the Board as to whether the Master Insulators Association of Ontario Inc. was an accredited employers' organization in respect of the residential sector of the construction industry. Therefore, contrary to the submissions of counsel for Local 95, section 127(2) of the *Labour Relations Act* has no application. That section of the Act refers only to accredited employers' organizations. However, as an employers' organization, it is clear that the Master Insulators Association of Ontario Inc. recognized Local 95 as the bargaining agent of the employees of members of the Master Insulators Association of Ontario Inc. "performing work...in all sectors of the construction industry, save and except the electrical power systems sector". It appears to us therefore that the second paragraph of the recitals and section 1.03(b) of the collective agreement relate to the collective bargaining relationship between Local 95 and the Master Insulators Association of Ontario Inc. in respect of members of the Master Insulators Association of Ontario Inc.

10. Section 51 of the *Labour Relations Act* provides in part:

"(1) A collective agreement between an employers' organization and a trade union or council of trade unions is, subject to and for the purposes of this Act, *binding upon* the employers' organization and *each person who was a member of the employers' organization at the time the agreement was entered into and on whose behalf the employers' organization bargained with the trade union or council of trade unions as if it was made between each of such persons and the trade union or council of trade unions and upon the employees in the bargaining unit defined in the agreement....*

(2) When an employers' organization commences to bargain with a trade union or council of trade unions, it shall deliver to the trade union, or council of trade unions, a list of the names of the employers on whose behalf it is bargaining and, in default of so doing, *it shall be deemed to bargain for all members of the employers' organization for whose employees the trade union or council of trade unions is entitled to bargain and to make a collective agreement at that time, except and employer who, either by himself or through the employers' organization, has notified the trade union or council of trade unions in writing before the agreement was entered into that he will not be bound by a collective agreement between the employers' organization and the trade union or council of trade unions.*"

[emphasis added]

11. The complainant was a member of the Master Insulators Association of Ontario Inc. and was also named on Schedule A to the collective agreement which lists employers that were active members of the Master Insulators Association of Ontario Inc. as of May 7, 1984, the date that the relevant collective agreement was executed. It is also undisputed that Local 95 holds bargaining rights in respect of the complainant's employees. Therefore, in the absence of any evidence to the contrary, and by virtue of section 51 of the Act, we are satisfied that the complainant is bound by the collective agreement, since it was a member of the Master Insulators Association of Ontario Inc. at the times material to this matter and Local 95 held bargaining rights in respect of its employees. See *London Sandblasting & Painting Ltd.*, [1982] OLRB Rep. Sept. 1322 at 1329; *The*

Little Falls Dining Room, [1985] OLRB Rep. Nov. 1624; *Delta Plumbing and Heating Ltd.*, [1964] OLRB Rep. Oct. 329; *Bruce Henderson Ltd.*, [1977] OLRB Rep. Aug. 480; *Fullerton-Weston Publishing Ltd. v. Brown*, (1971), 71 CLLC 14,083; *Twin Electric*, [1984] OLRB Rep. Feb. 393; *Paul D'Aoust Construction Ltd.*, [1976] OLRB Rep. Sept. 529; and *Baker, Gurney & McLaren Ltd.*, [1976] OLRB Rep. Mar. 78. Furthermore, by the express terms of the collective agreement, Local 95 is the bargaining agent in respect of employees of the complainant in all sectors of the construction industry except the electrical power systems sector.

12. Counsel for Local 1891, while conceding that Local 95 holds bargaining rights in respect of the residential sector, submits that the collective agreement does not apply to the residential sector. He relies on the admission made by Mr. Beamish that the terms of the collective agreement make employers who apply the terms and conditions of that collective agreement uncompetitive in the residential sector and Local 95's attempt to negotiate a separate residential agreement.

13. In our opinion, the desire on the part of Local 95 to negotiate a separate residential agreement cannot be considered as an admission that the collective agreement does not apply to the residential sector of the construction industry. Rather, we view it as an attempt to negotiate specific terms applicable to the residential sector with the Master Insulators Association of Ontario Inc. on behalf of its members in order to secure more work in that sector. However, the absence of specific terms applicable to that sector does not mean that the collective agreement does not apply to that sector. Section 1.03(b) of the collective agreement is quite clear in stipulating that the collective agreement, in respect of *members* of the Master Insulators Association of Ontario Inc., covers the residential sector of the construction industry. The absence of specific terms applicable to the residential sector simply results in having the same provisions applicable to both the industrial, commercial institutional sector and the residential sector of the construction industry.

14. Therefore, for the reasons outlined above, we are satisfied that the complainant was bound by the collective agreement between the Master Insulators Association of Ontario Inc. and The International Association of Heat and Frost Insulators and Asbestos Workers, and the International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 in respect of the residential sector of the construction industry.

15. This matter is referred to the Registrar for the continuation of the pre-hearing conference before the Vice-Chairman of this panel on November 24 and 25, 1986.

16. This panel of the Board is not seized with this matter.

1417-86-U Robert Williams, Complainant, v. Dough Delight Ltd., Respondent

Evidence - Parties - Practice and Procedure - Union having adequate notice of unfair labour practice complaint by employee against employer - Request at hearing to be added as party denied - Complainant witness refusing to deliver up to Board document tendered as evidence - Complainant's conduct precluding Board from proceeding further - Board proposing to dismiss complaint if document not surrendered.

BEFORE: *G. T. Surdykowski*, Vice-Chairman, and Board Members *J. A. Ronson* and *E. G. Theobald*.

APPEARANCES: *Robert Williams* on his own behalf; *Paul Young*, *Dan Devlin*, *Lorna Barrett* and *Stanley Bolton* for the respondent.

DECISION OF VICE-CHAIRMAN G. T. SURDYKOWSKI AND BOARD MEMBER J. A. RONSON; October 15, 1986

1. The name of the respondent is amended to read: "Dough Delight Ltd."
2. This is a complaint made under section 89 of the *Labour Relations Act* alleging that the respondent has treated the complainant in a manner that is contrary to section 66 of the Act.
3. At the commencement of the hearing into the complaint, the Bakery, Confectionery and Tobacco Workers International Union, Local 181 appeared before the Board in the person of its Secretary/Treasurer, Victor Dimarco. It was common ground that this trade union holds the collective bargaining rights for the employees of the respondent in the bargaining unit described in a certificate issued by the Board on June 26, 1986 and that there is presently no collective agreement between the respondent employer and the Union. Mr. Dimarco advised the Board that he appeared on behalf of the union to request that the Board grant it status as a party to this proceeding. He further requested that, if the Board granted status to the union, the matter be adjourned in order to permit the union to retain counsel and prepare its case. The respondent objected to both the addition of the union as a party to the proceedings and to any adjournment of the matter. For his part, the complainant submitted that the union should be added as a party but that the matter should proceed without any adjournment.
4. The union offered no reasons for not delivering an intervention or otherwise notifying either the parties or the Board of its desire to participate in this proceeding prior to the morning of the hearing. It appears from the record that the union was sent a copy of this complaint, by the Board, under cover of letter dated August 14, 1986; that it was sent a Notice of Hearing to be held on October 2, 1986 from the Board by letter dated September 3, 1986; and that it was sent a copy of the respondent's reply, again by the Board, by letter dated September 22, 1986. There was no indication given by the union that it either did not receive any of the materials, or that any of them were not received in a timely manner. Nor did the union indicate what its "case" was, or make any suggestion as to how its interests were different from those of the complainant. Nor did it suggest how, if at all, any interests it might have could be affected by the disposition by the Board of this complaint. In short, the union failed to put forward any reason why the Board should exercise its discretion to add it as a party to these proceedings at this late date and accordingly the Board unanimously rejected the union's request that we do so. We did indicate of course that the union was entitled to provide assistance to Mr. Williams and Mr. Dimarco did remain at the hearing and sat with Mr. Williams.

5. As a result of the Board's ruling in respect of the union's request that it be added as a party, it was unnecessary for us to rule on the request for the adjournment since both parties wished to proceed. However, we do feel constrained to add that the Board will not normally exercise its discretion to grant an adjournment unless all parties consent or there are exceptional extenuating circumstances. A party which had adequate notice of a proceeding does not have a right to an adjournment and is not entitled to insist on one for its convenience. It is for the Board to determine whether or not to adjourn on the basis of the circumstances of the particular case as weighed against the desirability for expeditious proceedings in labour relations matters (see *Re Flamboro Downs Holdings Ltd. and Teamsters Local 1879* (1979) 24 O.R. (2d) 400, (Ont. Div. Ct.)).

6. After the Board's ruling the parties advised that there were no other preliminary matters. Both parties then made opening statements and, the onus being on the respondent employer pursuant to section 89(5) of the Act, the employer called its first witness, Lorna Barrett. Early in her testimony counsel for the respondent asked her to identify a document purporting to be an application for employment with the respondent from Mr. Williams. Mr. Williams would not admit that the document was what it purported to be and objected to the introduction of the document into evidence on the basis that it was irrelevant. In order to try to expedite the matter, Mr. Young, counsel for the respondent, placed the document in front of Mr. Williams. The complainant maintained his objection. On hearing further evidence from Mrs. Barrett, the Board ruled that it would admit the document into evidence as Exhibit 2. Mr. Williams then refused to return the document to the respondent or to hand it to the Board. He advised the Board that he took exception to the manner in which counsel had placed the document before him, that it was not relevant to his complaint, and that he was retaining it as "evidence".

7. After a brief recess, the Board unanimously ruled that the original of the document purporting to be his application for employment with the respondent was material and essential to the Board's considerations and that the Board required the document to be marked as an Exhibit. We directed Mr. Williams to give the document to us. Mr. Williams indicated that he might be prepared to deliver up the document but under protest and that he required a receipt from the Board. The Board took Mr. Williams's use of the word "protest" to mean that he maintained his objection and on that basis indicated that it would receive the document, mark it as an Exhibit, and note his objection thereto. We advised him that we would not issue a receipt. Mr. Williams agreed to deliver up the document but indicated that he had hidden it away for safe keeping. The Board then adjourned for lunch in order to enable Mr. Williams to retrieve the document.

8. Upon recommencing, Mr. Williams advised the Board that he had obtained "legal advice" and that he was not prepared to deliver up the document. He stated that the Board had no jurisdiction to either rule the document relevant and admissible, or to order him to deliver it up to the Board. He demanded that the Board order counsel for the respondent to apologize for his actions. He also stated that the Board is responsible for maintaining decorum and that it had failed to do so.

9. The Labour Relations Board is an administrative tribunal established by the Legislature of this province to regulate labour relations. Subject to the specific provisions of the *Labour Relations Act*, any other applicable legislation, and the rules of natural justice and fairness, it is the master of its own procedure. Under section 106(1) of the Act, the Board has the exclusive jurisdiction to exercise the powers conferred upon it by or under the Act and to determine all questions of fact or law that arise in any matter before it. The Board is specifically empowered (by section 103(1)(c)) to accept such oral or written evidence as it in its discretion considers proper, whether or not such evidence would be admissible in a court of law. There can be no doubt that the Board

had the jurisdiction, and the obligation, to rule on the relevance and admissibility of the document in question. No party can dictate to the Board what evidence it may or may not hear.

10. The Board must conduct itself judicially and must maintain decorum in the hearings before it. In this instance, Mr. Williams is being overly sensitive to what he perceives to be a slight towards himself by Mr. Young. In our view, Mr. Young is not guilty of any impropriety. Furthermore, if there has been any breach of decorum, it has been by Mr. Williams as evidenced by his general attitude and demeanour and by his refusal to comply with the Board's rulings and directions. Indeed, his conduct borders on contempt of this Board and its processes. It certainly precludes the Board from proceeding further.

11. Accordingly, the Board unanimously ruled and advised Mr. Williams that it would not proceed further with the hearing into his complaint until such time as he complied with the Board's direction that he deliver up to us the document in issue. The Board further advised Mr. Williams, that if he failed to comply with the Board's direction within a reasonable time the Board would have to consider how to dispose of the matter.

12. As Mr. Williams made some further assertions of this panel's lack of jurisdiction and other derogatory comments, the Board adjourned the proceeding.

13. In the result, the Board reiterates its order that the complainant deliver up to the Board, the original of the document purporting to be his application for employment with the respondent and which is presently in his possession or power. If he does so, by delivering the document to the Board's offices at 400 University Avenue (4th floor), Toronto, by 12:00 o'clock noon on Friday, October 31, 1986, the matter will be relisted for hearing in accordance with the Board's normal procedures. In view of the complainant's conduct and his refusal to recognize the authority of this Board, if Mr. Williams fails to comply with the Board's order, the Board will exercise its authority, under section 89(4) of the Act, to not inquire into the matter further and this complaint will be dismissed.

14. The decision of Board Member E. G. Theobald will follow.

0827-86-R The Employees of Fern Brand Waxes Ltd., Applicants, v. International Union of Allied Novelty and Production Workers, Local 905, Respondent, v. **Fern Brand Waxes Limited**, Intervener

Petition - Termination - Signatures on petition consisting of first or last names only - Whether Rule 73 requiring signatures in full - Whether incomplete signatures indicating employees did not know what they were doing

BEFORE: *Lita-Rose Betcherman*, Vice-Chairman, and Board Members *F. W. Murray* and *P. V. Grasso*.

APPEARANCES: *Shareef Azees* and *Harold Edwards* for the applicants; *Murray Gold* and *Vincent Knap* for the respondent; no one appearing for the intervener.

DECISION OF LITA ROSE BETCHERMAN, VICE-CHAIRMAN, AND BOARD MEMBER F. W. MURRAY; October 6, 1986

1. The name of the respondent is amended to read: "International Union of Allied, Novelty and Production Workers Local 905."
2. This is an application for a declaration terminating bargaining rights under section 57 of the *Labour Relations Act*. Under section 57(3) of the Act the Board is required to ascertain "the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing [by the terminal date] that they no longer wish to be represented by the union." If not less than 45 per cent have signed a termination petition, following its normal practice the Board will order a representation vote. The terminal date for this application was June 19, 1986.
3. In support of the application, a timely petition witnessed and signed by 22 of the 23 employees in the bargaining unit was filed with the Board. The petition was headed "WE EMPLOYEES OF FERN BRAND DO NOT WANT THE UNION". Dated June 16, 1986, it bore 22 signatures of which 12 were first or last names only.
4. The respondent union challenges the petition on the ground that it does not meet the formal requirements of the Board's Rule 73. This rule states *inter alia* that the Board shall not accept a declaration terminating bargaining rights unless the evidence is in writing and signed by the employees. The union counsel argued that in order to satisfy the requirements of Rule 73, signatures must consist of the name in full. Citing *Chalcraft v. Giles* ([1948] 1 All E.R. 700), he claimed that a valid signature required a mark, initials, or the name in full. Counsel further argued that the incomplete signatures raised doubt that the employees knew that they were doing.
5. The petition's organizer, Shareef Azees, testified that the union had been inactive since the collective agreement was ratified two years earlier and that the members were unanimous in wanting to terminate its bargaining rights. He stated that when the agreement came up for renewal, his co-workers asked him to take the lead in ousting the union because of his facility in the English language. He said that he did not have a contact in the union so he went to the plant office to get the telephone number. Mr. Azees phoned the union and spoke to a Mr. Johnson. He then received a call from the Business Agent, Vince Knapp. It was agreed that a union meeting would be held in the plant lunch room.
6. This meeting took place on May 12, 1986. Mr. Knapp testified that he had intended to raise the matter of the contract renewal and to ask for recommendations. However, he acknowledged that the meeting centred on the members' dissatisfaction with the union and that he was given a piece of paper to that effect with the names of all those present.
7. Approximately two weeks later Mr. Azees called Mr. Knapp. On learning that the union would not step out, Mr. Azees prepared the petition. He stated that he telephoned the Board offices for information.
8. Mr. Azees testified that the names on the petition were obtained just prior to the beginning of the shift on June 16th. All employees signed except one employee who was absent that day. Mr. Azees stated that there was no management personnel in the vicinity and that the supervisor was on holidays. His testimony that all the employees were happy to sign was confirmed by two other petitioners, Harold Edwards and Salvator Figlizzi. The latter testified that he explained the petition in Italian where necessary.

9. The union concedes that the events at the May 12th meeting suggest membership dissatisfaction with the union.

10. The Board finds on the evidence that there was clear and unequivocal opposition to the union on the part of the members. Indeed, the union did not seriously contest this. Moreover, there was no allegation of employer interference. This case clearly hinges on whether the incomplete signatures are acceptable for purposes of section 57(3) of the Act.

11. Having heard the evidence and argument, the Board is satisfied that the incomplete signatures should be accepted. Our reasoning is as follows: The signatures were duly witnessed by the three petitioners who testified to the surrounding circumstances. Their oral evidence substantiated that the signatories knew what they were signing. In the Board's view, the *Chalcraft* case is compatible with our conclusion. In *Chalcraft* the court stated, that, to be a completed signature, the name or mark should be "intended to represent the name." In the instant case, the Board has no doubt from the evidence adduced that the employees who signed the petition with their first or last name intended that form to represent their name. It should be noted that we are not dealing here with a sophisticated body of people but with recent immigrants unguided by counsel and unschooled in legal technicalities. Having determined that the petition was signed knowingly and voluntarily, we conclude that we should not be overly technical under the circumstances.

12. Accordingly, pursuant to section 57(3) of the Act, the Board will conduct a representation vote of the employees in the bargaining unit. Those eligible to vote are all employees of the Company, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation periods on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

13. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with the intervener.

14. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER P. V. GRASSO;

1. I dissent.

2. It is an established principle of Labour Relations Law in Ontario that the signatories of a petition to terminate a collective agreement bears the onus of satisfying this Board by credible evidence that the petition is a voluntary expression of employee wishes by giving detailed testimony of the circumstances in which the petition was prepared, circulated and signed.

3. One of the key concerns that I have in this case is the petition itself. Here we have a petition signed by 22 employees in the bargaining unit of which 12 employees signed either their first or last name only.

4. I find on the evidence that the document submitted by the applicant in support of its application for a declaration terminating the bargaining rights was ambiguous and does not meet the requirements of Rule 73 of the Regulations.

5. The Board has long maintained that it will not accept a declaration terminating bargaining rights unless the evidence is in writing and signed by the employees.

6. I find it very difficult to accept first or last name only on a document of this type to be valid signatures.
 7. I would accordingly dismiss the application without prejudice to the right of the applicant to file a new application.
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0583-86-R Christian Labour Association of Canada, Applicant, v. Geri-Care Nursing Home of Caressant Care Limited, Respondent

Bargaining Unit - Certification - Whether there should be separate bargaining units for part-time employees in the rest home and nursing home - Part-time units mirroring full-time units

BEFORE: *Judith McCormack*, Vice-Chairman, and Board Members *F. W. Murray* and *R. R. Montague*.

APPEARANCES: *Ron Rupke* and *Hank Kuntz* for the applicant; *Edward V. Johnson* and *Gerry McKerral* for the respondent.

DECISION OF THE BOARD; October 7, 1986

1. This is an application for certification in which the applicant seeks to be certified for a unit of part-time employees of the respondent. The respondent's full-time employees are also represented by the applicant by virtue of two certificates issued by the Board on February 18, 1986 and April 9, 1986, for employees of the rest home and nursing home respectively. At that time the parties agreed upon separate bargaining units for the two groups of full-time employees.
2. The parties are now in dispute as to the description and composition of the unit or units of part-time employees appropriate for collective bargaining. In accordance with its usual practice, the Board appointed a Labour Relations Officer to enquire into and report on (a) the community of interest between the employees in the nursing home and the rest home and (b) the community of interest between the employees who are regularly employed for not more than twenty-four hours per week and students employed during the school vacation period regardless of their location in the rest home or nursing home. On September 8, 1986 the Board held a hearing to entertain the parties' submissions on the matters remaining in dispute.
3. At the hearing the parties confirmed that they had agreed to have part-time employees and students included in the same bargaining unit. As a result the only outstanding issue in this regard was whether there should be separate bargaining units of part-time employees in the rest home and nursing home. The applicant proposes one inclusive unit while the respondent argues that separate units are appropriate.
4. The parties also agreed to rely on the facts as set out in a previous examination with respect to the full-time employees conducted by a Labour Relations Officer on August 13, 20 and 21, 1985 together with an agreed statement of facts describing changes in the work place which had occurred since that time.
5. The respondent is the operator of a nursing home and rest home in Harriston, Ontario.

The two facilities are contained within the same building although they have separate entrances and are different in terms of interior decor. They include separate blocks of bedrooms, separate parking areas, separate call bell systems, separate dining areas, separate bathing facilities and separate staff lounges although the rest home staff may use the nursing home staff lounge on occasion. The two facilities are separated by doors with alarms which must be deactivated by pressing a sequence of numbers, although one paging system serves both homes.

6. Both homes come under the direction of one Administrator. Below her is a Supervisor for the rest home and a Director of Care for the nursing home. Although there are separate offices, it appears that the nursing home office is where the overall typing and administration is handled, with the rest home office handling billing and some paper work for that area alone. Employees from both homes are paid by the same numbered company and money paid by the residents in both areas goes into the same bank account.

7. The functions of the two facilities differ to some extent. While both provide care and assistance to residents, the nursing home provides a higher level of actual nursing care to a resident group which is generally more disabled than that of the rest home.

8. The differences in the nature of the care provided are reflected in the staffing of the two homes. The nursing home employs registered nurses, registered nursing assistants, health care aides, nurses' aides, cleaning, laundry, dietary and activity staff in contrast to the rest home which employs registered nursing assistants and house mothers. It also appears that functions in the nursing home are more differentiated. For example, the functions performed by a dietary aide, cleaner, and nurse's aide in the nursing home are performed to some extent by a house mother in the rest home. This differentiation may be partly because the nursing home is the larger facility.

9. The hours of work for employees are slightly different in the two facilities. Uniforms are worn by all nursing home employees and the registered nursing assistants in the rest home, while house mothers in the rest home wear street clothes. There are separate time sheets for the two homes although within the nursing home there are also separate time sheets for different groups of staff such as the dietary staff. Vacation requests, hiring, discipline, and staffing are dealt with by the Supervisor of the rest home and the Director of Care of the nursing home respectively for their own areas, sometimes in consultation with the Administrator.

10. Although there are separate policy manuals for the two areas, there are also separate policy manuals for different groups of staff within the nursing home. It also appears that in many instances the policies contained in the nursing home and rest home manuals are either identical or similar, including policies on resignations, staff meals, sick leave, holidays, probation periods, evaluations (although different forms are used), personal conduct, and so forth. Wages for the registered nursing assistants, the only common classification, are the same in both homes.

11. There is no exchange of employees between the two facilities in terms of replacing each other. However, the nursing home staff prepare and serve all meals in the rest home as well. A maintenance employee works throughout the establishment and the rest home staff do the laundry for both facilities. Since the rest home now includes two areas which are physically located at both ends of the nursing home, rest home employees must pass through the nursing home in the course of their work on a regular basis. In addition the registered nurses and nursing assistants in the nursing home are essentially "on call" for emergencies in the rest home.

12. When there are job openings in either facility, it appears that in the past, employees in the other area have been given the opportunity to apply for the vacancies, although not necessarily in preference to outside applicants. However, if they are chosen (as at least three have been), they

will start at a higher pay rate than if they had been hired from outside the work place. The evidence was that the three employees who had moved from one facility to another had given verbal resignations to their supervisors before moving, although their original records including their original employment applications were simply transferred to the new area.

13. On the basis of the evidence before us, we are not persuaded that these employees have separate communities of interest. Although there are obvious differences in the nature of their work, they are all engaged in the general area of geriatric care and those differences are insignificant in terms of establishing a meaningful collective bargaining relationship. The unification of the administrative structure at a point so close to bargaining unit employees, the similarity of their working conditions and the interdependence of the two groups with respect to such integral aspects of their work as meals, laundry and nursing emergencies all point to shared interests in the context of collective bargaining.

14. However, this does not dispose of the matter before us. Although community of interest is an important and compelling factor in the Board's determination of the appropriate bargaining unit, it is not the only element the Board considers. Another significant factor is the structure of other collective bargaining relationships in the work place. The Board has consistently followed a policy of having bargaining units of part-time employees "mirror" the full-time units. (See *Ottawa General Hospital* [1983] OLRB Rep. March 434, *Sudbury Memorial Hospital*, [1982] OLRB Rep. Nov. 1722 and *Belleville General Hospital*, [1983] OLRB Rep. Jan. 7.) As the Board pointed out in *Ottawa General Hospital*:

The Board is extremely sensitive to the importance of avoiding, except for good reason, different bargaining unit configurations for full-time and part-time employees of the same classification, because of the potential for collective bargaining anomalies or distortions which that creates. It must be borne in mind that the same employee (and this may be particularly true in the health services field) may be "part-time" one week and "full-time" the next.

15. In *Sudbury Memorial Hospital*, the Board noted as follows:

The Board has, absent any unusual factors, generally followed a policy of having part-time units, organized at the same time or subsequent to the full-time units, mirror the full-time unit. No cases were cited to the Board where the Board has done otherwise...

16. In the instant case, the parties had agreed to separate bargaining units for full-time employees only a few months before this application and are currently in negotiations for those units. Under the circumstances, it was difficult for the applicant to argue that two bargaining units for the part-time employees would not be a viable collective bargaining structure and in fact, the applicant conceded that separate bargaining units would not be an unworkable arrangement. However, the applicant argued that the more inclusive bargaining unit it had proposed was a *more* appropriate unit and that the changes in the work place which had occurred since the full-time certificates were issued were such as to provide the reasons for making an exception to the Board's general "mirroring" policy.

17. For the most part, the changes referred to by the applicant tended to further support the proposition that there was a community of interest between the nursing home and rest home employees. However, on the whole, these changes were not significant enough to convince us to depart from the Board's usual practice in this matter.

18. The applicant also argued to the effect that since there were no longer any full-time employees left in the rest home bargaining unit, in reality there was only one functioning full-time bargaining unit, that is, in the nursing home. Consequently there should only be one bargaining

unit covering part-time employees. Once again, we are not satisfied that this fact alone establishes a reason to disregard the Board's usual practice. The applicant still retains bargaining rights for full-time employees who may be hired in the rest home in the future. Moreover, even if we were to adopt the applicant's position, the result would still be mismatched bargaining units because the full-time bargaining unit would cover only the nursing home whereas the part-time bargaining unit would cover both homes.

19. While the Board's "mirroring" policy is not inflexible, in the circumstances of this case it is also supported by the notion that some stability in labour relations is desirable. To determine that one unit would be appropriate for part-time employees several months after the parties have agreed on two units for the full-time employees does not strike us as a course of action which would either facilitate organizing or contribute to effective labour relations.

20. The Board has been accorded a broad discretion under section 6 of the Act to shape bargaining units which are appropriate for collective bargaining in each case whether or not such a bargaining unit is the *most* appropriate. (See *University of Windsor*, [1983] OLRB Rep. Mar. 478.) In the circumstances of this case, having weighed all the factors, the Board's view is that there should be separate bargaining units for part-time employees in the nursing home and the rest home.

21. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

22. The Board further finds the following to constitute units of employees appropriate for collective bargaining:

(1) Bargaining Unit #1

All employees of the respondent in its nursing home at Harriston, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff and persons for whom any trade union held bargaining rights as of May 27, 1986.

(2) Bargaining Unit #2

All employees of the respondent in its rest home at Harriston, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff and persons for whom any trade union held bargaining rights as of May 27, 1986.

23. In accordance with the Rules of Practice respecting applications for certification, the respondent employer has filed a list of employees in each bargaining unit, together with specimen signatures for the employees on each list. Having regard to the lists filed by the employer, and the finding of the Board with respect to the bargaining unit descriptions, the Board is satisfied that there were 31 employees in bargaining unit #1, and 9 employees in bargaining unit #2 at the time the application was made.

24. In support of its application for certification, the applicant union filed documentary evidence of membership in the form of cards, which consist of combination applications for membership and receipts. The union filed 33 cards, 20 of which coincide with the names of employees in

bargaining unit #1, and 6 of which coincide with the names of employees in bargaining unit #2. The membership cards are signed by the employees, and the receipts are countersigned and indicate that a payment of one dollar has been made within the six-month period immediately preceding the terminal date for this application. The money was collected by more than one person and the membership evidence is supported by a duly completed Form 9, Declaration Concerning Membership Documents.

25. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in each bargaining unit at the time the application was made were members of the applicant on June 11, 1986, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

26. Certificates will issue to the applicant with respect to bargaining unit #1 and bargaining unit #2.

1138-85-R; 1141-85-R Labourers' International Union of North America, Local 183, Applicant, v. **Lebovic Enterprises Ltd.**, Norcliffe Homes Limited, West Hill Redevelopment Company Limited and West Hill Homes, Respondents

Sale of a Business - Sale of inactive shelf company not constituting transfer of a business - Board discussing purpose of s.63

BEFORE: *Ian C. Springate*, Alternate Chairman, and Board Members *R. J. Gallivan* and *S. O'Flynn*.

APPEARANCES: *L. Steinberg* and *T. Pinto* for the applicant; *W. J. McNaughton* and *J. Lebovic* for Lebovic Enterprises Ltd., West Hill Redevelopment Company Limited and West Hill Homes; *David Cote* and *Michael Lebovic* for Norcliffe Homes Limited.

DECISION OF THE BOARD; October 3, 1986

1. File No. 1138-85-R is an application under section 63 of the *Labour Relations Act*. File No. 1141-85-R is an application under section 1(4). After the parties had completed leading their evidence, the applicant withdrew the application insofar as it related to File No. 1141-85-R.

2. The application in File No. 1138-85-R originally named as respondents only Lebovic Enterprises Ltd. and Norcliffe Homes Limited. Following opening submissions by counsel for the parties, applicant's counsel requested that "West Hill" be added as a respondent. Counsel indicated that he would be seeking a declaration that there has been a sale of a business from West Hill to Norcliffe Homes Limited. After a recess, counsel appearing on behalf of Lebovic Enterprises Ltd. indicated that he had been instructed to also appear on behalf of West Hill Homes and West Hill Redevelopment Company Limited and to waive any requirements relating to notice of the application. In these circumstances, the Board orally added both of these firms as respondents to the proceedings. Throughout the proceedings counsel for the parties used the term "West Hill" to refer to both firms as if there was no distinction between the two. We propose to treat the two firms in a like manner and refer to both simply as "West Hill".

3. Lebovic Enterprises Ltd. is owned and its affairs are managed by two brothers, namely Joseph and Wolf Lebovic. The firm, which was incorporated in 1953, is involved in the construction of single family homes and apartments. Joseph and Wolf Lebovic also control certain other construction companies, including West Hill. On August 12, 1981 this Board certified the applicant as bargaining agent for construction labourers in the employ of certain Lebovic companies, including Lebovic Enterprises and West Hill. Pursuant to the provisions of the Act relating to the industrial, commercial and institutional sector of the construction industry, these companies automatically became bound to the labourers provincial agreement. On April 14, 1984 Lebovic Enterprises signed a memorandum of agreement which "picked up" the terms of a collective agreement between the applicant trade union and the Toronto Housing Labour Bureau relating to the construction of low-rise housing. At the same time the applicant and Lebovic Enterprises entered into a letter of understanding which exempted a project then underway from certain of the provisions of the collective agreement.

4. Michael Lebovic is the son of Wolf and the nephew of Joseph Lebovic. After completing his university studies, Michael Lebovic worked for about one-and-a-half years with Tridel Construction as an assistant construction superintendent. He then joined Lebovic Enterprises as residential construction superintendent. In this position he was responsible for on-site operations, including negotiating contracts with subcontractors and supervising their work. Michael reported to Joseph Lebovic, who, on occasion, overrode his decisions. Michael was involved in the negotiations with the applicant relating to the low-rise collective agreement and the related letter of understanding, although another individual associated with Lebovic Enterprises had primary responsibility in this regard. Michael never held shares nor was he a director of Lebovic Enterprises or any of the other Lebovic companies. In his last year with Lebovic Enterprises Limited he was paid a salary of \$29,000 as well as a bonus of \$5,000.

5. In February 1984 Michael Lebovic left Lebovic Enterprises, in large measure because he was not getting along well with certain members of his family. Michael then worked as a residential construction superintendent for Grand Oak Homes, which is not a Lebovic-owned company. The position with Grand Oak Homes ended after four months, following which Michael Lebovic was unemployed for about seven months. Michael then had discussions with his uncle Joseph about the possibility of his going into the construction business on his own behalf. According to Michael this process was initiated by his mother and Joseph Lebovic's secretary, both of whom knew that he wanted to do something on his own.

6. In January of 1985 Michael Lebovic met twice with Joseph Lebovic, Joseph Lebovic's lawyer and a Mr. Armstrong from Victoria Woods, a non-Lebovic company. At the time Victoria Woods and West Hill were partners in Barchester Estates, a company then developing a large residential project in Scarborough. Barchester was selling serviced lots to a number of independent builders. During the course of the meetings referred to above, it was agreed that Michael Lebovic would purchase 11 serviced lots from Barchester Estates at the same price at which other lots had recently been sold to another builder. The standard form sales agreement used by Barchester Estates provided that a builder purchasing a lot would pay 15% of the purchase price with the balance being paid following the construction of a home and its sale to a customer. At Michael's request it was agreed that he could postpone payment of the initial 15% until the sale of the home, although he was required to pay interest on the amount. The evidence does not indicate one way or the other as to whether similar arrangements were made with other builders. Michael Lebovic testified that there were certain other amendments to Barchester's standard form sales agreement that he had asked for, but did not obtain.

7. To commence operations Michael Lebovic required an incorporated company. Rather

than have a company newly-incorporated for this purpose, it was proposed by Joseph Lebovic's lawyer that Michael purchase a "shelf company", owned by West Hill. The shelf company, then known as 483344 Ontario Limited, had no assets other than a minute book and a seal, and had never engaged in any business activity. It was agreed that Michael would purchase the shares of the company for \$350.00. Title to the company passed to Michael Lebovic in or about February, 1985. In March of 1985 the name of the company was changed to Norcliffe Homes Limited.

8. To finance its operations Norcliffe Homes arranged for a revolving line of credit of \$150,000 with the Toronto Dominion Bank. This line of credit has been drawn on by Norcliffe to finance the actual construction of homes. The line of credit is guaranteed by Michael Lebovic personally. It is also guaranteed by West Hill. When being cross-examined by applicant's counsel, Michael Lebovic agreed with the suggestion that it was unlikely that he would have gotten the line of credit if West Hill had not guaranteed it. He also indicated that without the line of credit he could not have started business on the scale that he did. It has not been necessary for the Bank to call upon the guarantors of the line of credit. Rather, Norcliffe Homes has kept the line of credit in good standing by making payments to the Bank from proceeds from the sale of completed homes.

9. Michael Lebovic is the owner and manager of Norcliffe Homes. He makes all decisions related to the operation of the company without any assistance from his father or uncle. The company operates out of Michael Lebovic's home, where his wife works as his secretary. Norcliffe Homes owns no large pieces of construction equipment. It does own some shovels and brooms which Michael purchased at a hardware store. The company has no direct employees, but rather subcontracts all of its work. Michael Lebovic lets the subcontracts and oversees the subcontractors' work. Some of the subcontractors engaged by Norcliffe Homes are firms Michael utilized when with Lebovic Enterprises, although others are firms which have not performed any work for Lebovic Enterprises. Homes built by Norcliffe Homes are sold under the Norcliffe name. Michael Lebovic deals with potential purchasers, and makes all decisions relating to the sale price.

10. As noted above, Norcliffe Homes originally purchased 11 lots from Barchester Estates. At the time of the commencement of the hearings in this matter, five homes had been completed and sold. Part of the proceeds of the sales had gone to pay Barchester Estates for the lots, and to repay money borrowed under the line of credit. Norcliffe Homes also entered into an agreement with a home buyer to build a home on another lot owned by Barchester Estates. Michael Lebovic negotiated the arrangement on behalf of Norcliffe Homes on the assumption that Barchester Estates would sell him the lot on the same basis as the previous 11. Barchester Estates, however, demanded an additional \$3,600 for the lot, meaning that Norcliffe Homes' potential profit was reduced by a like amount. Norcliffe Homes has also contracted to construct a home for an individual on land owned by that person in Markham.

11. Section 63 of the Act provides, in part, as follows:

63.-(1) In this section,

- (a) "business" includes a part or parts thereof;
- (b) "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom

the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

12. The applicant contends there has been a “sale” of a business, in the sense of a transfer of a business, from West Hill to Norcliffe Homes. The respondents acknowledge the sale of an inactive shelf company, but contend that nothing else changed hands, and that the shelf company by itself cannot be regarded as a “business”. The Act does not contain a definition of the term “business”. Accordingly, it is the Board which must give meaning to the term. In the *Raymond Cote* case, [1968] OLRB Rep. March 1211 the Board commented:

The meaning to be attached to the word ‘business’ depends to a great extent on the facts and circumstances in each particular case. It cannot be said that any one facet of an enterprise taken by itself necessarily comprises a business. It has been expressed that a business is “the totality of the undertaking”. The physical assets of buildings, tools and equipment used in a business are not necessarily the undertaking *per se* but are, along with management and operating personnel and their skills, necessary in the operations to fulfill the obligations undertaken with a hope of producing a profit to assure its success. The total of these things along with certain intangibles such as goodwill constitute a business.

13. The corporation utilized by Michael Lebovic to go into business was purchased from West Hill. The corporation had no meaningful assets and had not engaged in any activity. In our view, the sale of the shelf company by itself did not constitute the transfer of a business. However, the transfer of the shelf company is one factor which supports the applicant’s contention that there has been a sale of a business. Norcliffe Homes’ purchase of land from Barchester Estates, half owned by West Hill, also lends support to the applicant’s position. However, given that Barchester Estates was selling serviced lots to a number of independent builders only limited weight can be given this factor. Perhaps of more importance was Norcliffe Homes’ ability, by way of a guarantee at the Bank, to utilize West Hill’s financial standing as a basis for obtaining necessary bank financing. Without the guarantee, Norcliffe Homes would not have been able to start operations on as large a scale as it did. Indeed, it is possible it would not have been in a position to commence operations at all.

14. A corporate shell, land to build on and financing are all requirements of a home builder. However, these three elements by themselves are not enough to guarantee a successful business. There is also need for someone to bring these elements together, to arrange for and supervise the actual performance of the work, and to make the necessary construction and sales decisions. All of these functions are performed for Norcliffe Homes by Michael Lebovic. Michael gained much of his experience when working for Lebovic Enterprises, but as an employee and not as a principal of the company. Further, Michael had severed his relationship with Lebovic Enterprises approximately one year before. In these circumstances it cannot reasonably be said that there was a transfer of know-how or managerial ability from Lebovic Enterprises, or any of the other Lebovic companies, to Norcliffe Homes.

15. Apart from the minute book and seal of the shelf company, no equipment or other tangible assets passed from West Hill to Norcliffe Homes. Norcliffe Homes operates out of a new location, namely Michael Lebovic’s home. These are factors which also suggest that there has not been a sale of a business. We recognize, however, that equipment and a specific base of operation are not of great importance to firms that operate only as general contractors in the construction of residential homes since major construction equipment, and the facilities to store and maintain that equipment, are generally provided by sub-contractors.

16. The various criteria relevant to deciding whether or not there has been a transfer of a business from West Hill to Norcliffe Homes point to different conclusions. Indeed, this is one of

those rare cases where the criteria appear to be almost evenly balanced. In deciding the matter, we feel it appropriate to consider what we believe to be the purpose behind the enactment of section 63, namely the preservation of a union's existing bargaining rights, as well as the rights of employees represented by the union, when a business, or part of a business, changes hands. The applicant continues to hold bargaining rights for West Hill and Lebovic Enterprises. There is nothing in the evidence which suggests that their activities have in any way been reduced or diminished as a result of the activities of Norcliffe Homes. Nor is there any evidence to indicate that Norcliffe Homes is performing work which otherwise might have been performed by West Hill and/or Lebovic Enterprises. In short, it appears that Norcliffe Homes is in fact a new operation, which does not threaten or diminish the union's existing bargaining rights. Taking this into account, we are led to conclude that there has not, in fact, been a sale of a business within the meaning of section 63.

17. The application is accordingly dismissed.

1250-86-R; 1453-86-U; 2164-85-U; 1479-86-FC Michel LeBlanc, Applicant, v. Sudbury Mine Mill & Smelter Workers Union Local 598, Respondent, v. **Mansour Rockbolting Limited & Mansour Mining Equipment Supply and Repair Inc.**, Intervener; Sudbury Mine Mill & Smelter Workers Union Local 598 and Employees of the Respondent, Complainants, v. Mansour Rockbolting Limited & Mansour Mining Equipment Supply and Repair Inc., Respondents; Sudbury Mine Mill & Smelter Workers Union Local 598, Applicant, v. Mansour Rockbolting Limited & Mansour Mining Equipment Supply and Repair Inc., Respondents

First Contract Arbitration - Termination - Employer conduct, including separation of union supporters and non-supporters, tainting termination petition - Second termination petition tainted by circumstances surrounding the first - Small inexperienced employer failing to make expeditious efforts to conclude a collective agreement - Board directing settlement of first collective agreement by arbitration

BEFORE: *Patricia Hughes*, Vice-Chairman, and Board Members *D. H. Blair* and *H. Kobryn*.

APPEARANCES: *Richard A. Humphrey* and *Michel LeBlanc* for Michel LeBlanc; *G. Joe Zito* and *Roland K. Gauthier* for Sudbury Mine Mill & Smelter Workers Union Local 598; *Claude MacMillan*, *Milad Mansour* and *Rose Mensour* for Mansour Rockbolting Limited & Mansour Mining Equipment Supply and Repair Inc.

DECISION OF THE BOARD; October 6, 1986 as amended October 24, 1986

1. The above files were all listed for hearing during the same four-day period. The applicant union ("the union" or "Local 598") originally brought several unfair labour practice allegations under section 89 of the *Labour Relations Act* ("the Act") against the respondent employer ("Mansour" or "Mansour Mining" or "the employer") on November 19, 1985 ("the first section 89 complaint") (File No. 2164-85-U); the union subsequently filed additional section 89 allegations on August 14, 1986 ("the second section 89 complaint") (File No. 1453-86-U). On July 17, 1986, Michel LeBlanc ("LeBlanc") filed an application under section 57 of the Act on behalf of a group of employees seeking decertification of the union as bargaining agent for the employees at Mans-

our Mining (“the termination application”) (File No. 1250-86-R). On August 18, 1986, the union filed an application seeking a direction of settlement of a first collective agreement by arbitration (“the first contract application”) (File No. 1479-86-FC).

2. A hearing into the first section 89 complaint began on May 8, 1986, at which several exhibits were filed by the union and the employer. As a result of intervening events, the hearing of the first section 89 complaint began afresh and accordingly, the May 8, 1986 exhibits are hereby vacated.

3. At the outset of the hearing, we sought submissions from counsel for the union, the employer and LeBlanc with respect to the appropriate manner in which to deal with these applications. Because an application for first contract was involved, we had to consider section 40a (22) of the Act which states as follows:

Notwithstanding subsection (2), where an application under subsection (1) has been filed with the Board and a final decision on the application has not been issued by it and there has also been filed with the Board, either or both,

- (a) an application for a declaration that the trade union no longer represents the employees in the bargaining unit; and
- (b) an application for certification by another trade union as bargaining agent for employees in the bargaining unit,

the Board shall consider the applications in the order that it considers appropriate and if it grants one of the applications, it shall dismiss any other application described in this section that remains unconsidered.

In the matters before us, a first contract application has been filed with the Board; at the time of this hearing, no final decision has been issued on the first contract application by the Board; and an application for a declaration that the trade union no longer represents the employees in the bargaining unit has been filed. Counsel for the employer and the group of employees submitted that the termination application should be heard first; counsel for the union was satisfied that the termination application be heard first as long as we reserved our decision on it until we had heard all the evidence on all the applications. All parties agreed to this approach which we considered to be consistent with the requirements of section 40a(22). It was evident from the applications, and was agreed by counsel, that the evidence in all the applications was highly interrelated.

4. Accordingly, we ruled that the applications would be heard and decisions reached as follows: the termination application would be heard first, but we would reserve our decision on that matter until we had heard all evidence with respect to the first contract application and the section 89 complaints. We explained that if we ordered a representation vote and the vote was in opposition to the union, we would be required by section 40a(22) of the Act to dismiss the first contract application; if we dismissed the termination application, we would then consider and reach a decision on the first contract application; and that the nature of our rulings on the section 89 complaints would depend on the outcome of the termination and first contract applications.

5. We emphasize that our ruling with respect to the order in which these matters would be heard depends on the circumstances of this case. We emphasize further that it was possible in this case to integrate the evidence in the complaints under section 89 with the termination and first contract applications. Counsel had no evidence to call which lay outside the confines of those applications. Counsel were further able to make submissions on all these applications in a short period of time. However, there may be cases in which it is not possible to hear all section 89 evidence, given the time limits imposed by the legislation on first contract application cases. In those cases,

whether evidence or submissions go to liability or to remedy, it may be necessary for the Board to reserve on the section 89 complaints and to hear further evidence subsequently.

6. Our decisions on the termination and first contract applications were released September 15, 1986. We dismissed the termination application and we directed the settlement of a first contract by arbitration. We reserved further on the section 89 complaints. We now set out reasons for our decision in each matter.

7. The history of this case should be outlined briefly. Milad Mansour, President and owner of Mansour Mining, has owned his company for about 12 years. Prior to that, he was a labourer at Inco. He acquired equipment and began straightening steel for Inco after his regular work hours, first hiring part-time and then full-time assistance, at a location on Highway 69. He subsequently quit Inco and opened his second location in Coniston, just outside Sudbury. In the early summer of 1984, he purchased property on LaSalle Boulevard in Sudbury, and commenced building new facilities there late in 1984 or early 1985. He moved out of the Highway 69 plant and into LaSalle at the end of February. Employees were transferred from Coniston to the new LaSalle location after June 23, 1986. These applications are confined to the Coniston and LaSalle locations. In the last weeks of February 1985, one of the employees, Andrew Paquette, telephoned Richard Briggs, President of Local 598, with respect to joining a union. By March 6, 1985, cards had been signed and Briggs filled out an application for certification.

8. The union was certified May 3, 1985 (File No. 3313-84-R); the panel hearing the certification application dismissed a petition by employees in opposition to certification of the union ("the certification petition") on the basis that it was untimely. The union subsequently sent out a notice to bargain to the employer and eventually bargaining began and proceeded for a time. However, problems arose and in November of 1985, the union brought the first section 89 complaint, but because it seemed the employer was prepared to bargain, the union subsequently requested the Board not to proceed. When no progress was made, the union decided to pursue its complaint and a differently constituted panel began to hear those allegations on May 8, 1986. Continuation of the hearing was scheduled for June 23rd and 24th, 1986; however, in the interval, an application for termination of the union's bargaining rights was filed by Michel LeBlanc on April 22, 1986 ("the April termination application" or "the first termination petition") (File No. 0362-86-R). At the commencement of the June 23rd hearing, the parties sought to have the two matters heard together and the matters were consolidated, pursuant to an interim settlement between the union and the employer ("the June 23rd settlement"), by an oral ruling at the hearing, confirmed by written decision dated July 3, 1986. These matters were thereby adjourned and were scheduled to be heard by another panel on August 19th, 20th and 21st, 1986. On the first day of that hearing, the April application for termination was dismissed as untimely, confirmed in written decision dated August 25, 1986. A second application for termination by LeBlanc had been filed July 17, 1986 ("the July termination application" or "the second termination petition"). Before the dates with respect to that application had been set, the application for a first contract was filed on August 18, 1986, and mindful of the time limits imposed by section 40a(2) of the Act with respect to first contract applications, the Board scheduled the first contract application to be heard September 8 to 11, 1986 by another panel; all other matters were also scheduled for that period.

9. We now give our reasons for dismissing the termination application.

10. With respect to the July termination application, which is the application before us, initially a single document with seven signatures dated July 16, 1986, was submitted. Before the terminal date of August 28, 1986, five additional statements of desire were filed; two of these were dated August 22, 1986 and three were dated August 26, 1986. The application was timely, having

been filed more than one year after certification of the union which has not made a collective agreement with the employer, pursuant to section 57(1) of the Act, and having been filed more than thirty days after the Minister released a notice that he did not consider it advisable to appoint a conciliation board (issued May 13, 1986), pursuant to section 61(1)(b) of the Act. Accordingly, since twelve signatories constitute more than forty-five per cent of the employees in the bargaining unit, the requirements for a representation vote, as set out in section 57(3) are satisfied if the Board finds the signatures to be a voluntary expression of the wishes of the employees. Therefore, the Board is required to satisfy itself that the petitions constitute a voluntary expression of the signatories' wishes and if the Board is not so satisfied, it will dismiss the decertification application. The onus of establishing voluntariness lies on the applicant.

11. In determining whether a termination petition does reflect the employees' wishes, the Board may look at a variety of factors relevant to the likelihood of an employee perception that their signing or not signing the petition would come to the attention of the employer. While direct management interference will almost certainly be fatal to a petition, indirect interference may also lead the Board to dismiss the application. It is not surprising that an employer might favour decertification of the union: mere opposition to a union does not pose difficulty. But actual involvement by management in a petition for decertification or communications, direct or indirect, that failure to sign the petition carries with it negative employment consequences or which indicates that rejection of the union will bring forth benefits goes beyond mere opposition. Such conduct does not have to be contemporaneous with the organization, preparation or circulation of the petition; it can occur before - but it is required that either contemporaneous or prior conduct can reasonably be said to indicate to the employees that their support or non-support of a petition may influence their working conditions. Furthermore, management influence does not have to be actual; it is the perception of the employees which counts. The issue is essentially this: is the climate in the workplace, over which the employer has control, such that the Board has a concern that the employees will not be able to express their wishes freely? Thus the relative numbers of union supporters and non-supporters do not determine the outcome of the termination application since the Board must be satisfied that the non-supporters have made their decision uninfluenced by employer conduct, as discussed above.

12. In some cases, one factor may be sufficient to satisfy the Board that the signatures on the petition are not a voluntary expression of the employees' wishes; in other cases, several factors may interact with each other and while each factor may not separately establish that the signatures are not a voluntary expression, cumulatively they may do so: *Otto's Deli*, [1980] OLRB Rep. Nov. 1673; there the Board stated at paragraph 22 that "[n]one of [the factors involved in the case] operate independently and in our view their cumulative effect would be sufficient to suggest to the average employee that their employer actively wish them to reject their union and that they might suffer adverse employment consequences if they chose not to do so". In this case, the cumulative effect of several events satisfy us that the second termination petition is not a voluntary expression of the employees' wishes. These events are the \$1.00 raise and benefit package which the employer gave the employees subsequent to certification and the resulting employee perception of the union's inability to represent them adequately; comments by the employer about the union and other unilateral changes in working conditions; the separation of the workers into those supporting and those not supporting the union; and the circumstances of the first termination petition which in our view taints the second termination petition.

13. Although the evidence on this matter was conflicting, we find that prior to certification of the union, the employees then employed at Mansour Mining had a meeting on April 1, 1985, with Mansour and his lawyer, Claude MacMillan, at which Mansour indicated that he would give them \$1.00 an hour raise and a benefit package if the employees did not join the union. The union

was certified, despite the petition filed by the employees in opposition to certification, which was signed about half an hour after the meeting had concluded. At the certification hearing the petition was found to be untimely. However, those promises remained a topic of discussion and suggested to the employees that they did not need a union. This view was confirmed when they again approached Mansour and demanded the raise later in May. Mansour granted the raise and benefit package directly to the employees as of June 1, 1985. (The employees continue to receive the \$1.00 an hour increase, but Mansour stopped paying benefits sometime in September 1985. However, the \$1.00 increase on the hourly wage rate has now become "other", thereby leaving the employees at a lower base rate.) On October 8, 1985, the union held a meeting with the employees to explain the progress in negotiations to that date. At that meeting the union's business agent, Roland Gauthier, told the employees that the union thought a raise of 50 cents an hour was consistent with the employer's financial position and a first contract. The union believed that the employees were still earning their old wage rates, having not been informed by the employer of the new rates. The employees were hardly impressed with the union's proposal, since they were already receiving the extra \$1.00 an hour. Only after this meeting did two of the employees, Andrew Paquette and Michel Landry, tell Gauthier about the \$1.00 raise.

14. The importance of "well-timed" "unilateral" wage increases was noted by the Board in *Otto's Deli, supra*. We recognize that the July termination application came over a year after the increase had been granted and that even the April termination application was filed nearly a year after the increase, and that most of the signatories of the April and July termination application petitions had been hired after certification. We are also aware that of the six original employees, four have remained union supporters and only two supported decertification. Nevertheless, in our view, the unilateral \$1.00 rate remained a factor; its impact continued to be felt. The employees were confused. Landry admitted he was still confused at the time of the hearing. Furthermore, LeBlanc admitted that the employer's promises were still in his mind when he began to collect signatures for the second termination petition. Most importantly, we believe that the granting of the increase gave a lasting impression that the union could not adequately represent the employees and was, indeed, incompetent. It is not unreasonable to conclude that the employees were under the impression that the union could do little for them, an impression reinforced by the lack of a collective agreement.

15. The effect of the increase must also be coupled with other messages from the employer that support of the union was not advantageous to the employees.

16. Paul Heddersen began work at Mansour Mining on November 11, 1985, several months after the union had been certified and after the \$1.00 raise had been put into effect. About three and a half months after he began, he asked Peter Mansour, a member of management, for a raise. Peter Mansour, according to Heddersen, told him that he would arrange for a raise as long as he would stay away from the union and keep it between themselves and Milad Mansour; if he joined the union, he would receive nothing. About two weeks later, Heddersen was put on salary; at a union meeting which he subsequently attended, he was told that Mansour was putting employees on salary to make them staff and ineligible for union membership. Heddersen tried to go back to being an hourly-paid employee, but Mansour told him that he could leave if he was not prepared to stay on salary. Heddersen testified that he went on salary "to keep my job". Donald Pilon, one of the original six employees, was also put on salary. In neither case was there any change in their job responsibilities, duties or authority. In addition, both Heddersen and Pilon were given unilateral 50 cents an hour increases by the employer.

17. Ralph Wirnsperger started at Mansour Mining on May 1, 1986, went on strike June 9, 1986, was not recalled after the strike and received a separation slip sometime after June 23, 1986.

He says that when he started, he asked Mansour if there would be union dues payable and that Mansour answered “no union, I don’t want a union”. Counsel for the union argued that this indicated that Mansour told Wirnsperger that there was not a union at Mansour Mining when there was; having heard Mansour testify, it is just as likely that he was expressing his opposition to the union, rather than misleading Wirnsperger about the presence of the union. In any case, it is another instance of Mansour’s difficulty in coming to terms with the presence of the union at his company. Wirnsperger found out about the union when he was transferred to the Coniston plant; there he was asked by Andrew Paquette if he wanted to join the union and he did so.

18. By the time LeBlanc collected signatures for the second termination petition, Mansour had separated union and non-union supporters. After the June 23rd settlement, the union supporters and non-supporters were placed on different shifts, half an hour apart, at the Coniston plant. A few weeks later, the non-supporters were moved to the new plant at LaSalle with far preferable facilities. Mansour claimed that the agreement between the parties required him to do that; however, a look at the agreement indicates that is not so. He also said he had to separate them because of the difficulties between them; we are cognizant of those difficulties, for which both groups must take some responsibility, but it remains that the result was to place union supporters in less advantageous conditions, either on regular afternoon shifts or in the old plant. Furthermore, just prior to the hearing, all four employees at Coniston, all union supporters because of the separation, had been laid off apparently because a broken saw meant no work for them, despite there being employees at LaSalle with less seniority. (These lay-offs were in apparent contravention of the June 23rd settlement which stated that there would be no lay-off without cause and that legitimate lay-offs would be in order of seniority.)

19. The Board has accepted as a principle that a previous petition found not to be voluntary may “taint” a subsequent petition, although certainly a second petition may not be so tainted. In *Ontario Hospital Association (Blue Cross)*, [1980] OLRB Rep. Dec. 1759, the Board stated at paragraph 37:

... While the *N. J. Spivak Limited*, [1977] OLRB Rep. July 462 and *Mary Lockwood*, [1979] OLRB Rep. Dec. 1172 cases make it clear that an earlier unacceptable petition need not “taint” a later one, at least where a significant hiatus occurs, the Board on numerous other occasions has in fact refused to recognize a petition on the ground that it has been “infected” by improper circumstances surrounding the taking of a previous petition (see *Levi Strauss*, [1972] OLRB Rep. Dec. 1042).

Limits to this concern were suggested by the Board in *M. G. Burke Investments Ltd.*, [1979] OLRB Rep. Jan. 45 at paragraph 8, after it rejected a second petition because of the employer’s involvement in a previous petition:

The Board, it should be made clear, is not saying that employer involvement in a previous termination application must forever taint the efforts of employees who decide later to make a subsequent one. There comes a point beyond which the influence of the employer will, in the absence of further involvement, be taken to have been dissipated. Where, however, as here, the second application is made within a few months of the first, and where, as here, it is made before the first is disposed of by an employee who has been involved in the earlier proceeding both as an originator and a witness, the Board will not lightly conclude that the employer’s involvement is of no further effect.

We note that in this case the second termination petition was filed prior to the first termination application being heard and that Michel LeBlanc, who originated the second termination petition, also originated and circulated the April petition.

20. The first termination petition in this case was dismissed as being untimely. In *Mary*

Lockwood, supra, the Board found a second petition to be voluntary and rejected the argument that the first petition was involuntary and tainted the second; it further stated that even if the first petition had been found to be involuntary, it would still have found the second petition to be a voluntary expression of the employees' wishes because of the circumstances of the case. However, the Board was prepared to consider the impact of the first petition even though it, like the April termination application in this case, had been dismissed as untimely. We ourselves heard evidence about the first termination petition and base our conclusions about whether the signatures were voluntary on that evidence.

21. With respect to the April petition, LeBlanc went into the Coniston shop while he was on workers' compensation. (In fact, during the period from January 1986 to August 1986, he was at work only for a two-week period in March. During the rest of the time, he was off work on workers' compensation, yet was in the forefront of the anti-union movement.) He approached each employee at work during working hours and obtained signatures from some of them. He spoke only to the employees he thought were against the union, except Michel Landry. LeBlanc had asked the employer's lawyer, MacMillan, for advice and MacMillan, after telling him he could not be involved, referred him to a lawyer named LeBlanc; Michel LeBlanc was not satisfied with him and, despite MacMillan's comment to him, felt he could return to MacMillan who then referred him to LeBlanc's current counsel. LeBlanc stated that he did not know that the company could not be involved, but could not similarly explain his second visit to MacMillan. The wording on this petition was given to him by LeBlanc, the lawyer, and the petition was typed by Michel LeBlanc's girlfriend. Michel LeBlanc apparently obtained the address of the Labour Relations Board from Rose Mensour, the company's secretary, although it is not clear from LeBlanc's testimony whether he called Mensour with respect to the April petition or the July petition. It is more consistent with LeBlanc's conduct and the fact that the second petition was largely under the control of LeBlanc's counsel that he called Mensour before obtaining signatures for the first petition.

22. In *Parker's Dye Works & Cleaners Limited, Toronto*, [1974] OLRB Rep. Dec. 859, the Board stated at paragraph 37 that "mere organization of a petition on employer premises and employer time is not in itself cause to set aside an otherwise voluntary statement of desire" and that "[i]ndeed, the origination, preparation and circulation of a petition in support of an application for termination may very well take place on company premises and with the knowledge of management but so long as the Board is satisfied that the statement filed is 'a voluntary expression' of employee desires, the Board will give effect to the statement". This statement must be read in conjunction with the Board's comments in *The Journal Publishing Company of Ottawa, Limited*, [1978] OLRB Rep. March 291 at paragraph 6 that "[i]f a petition has been circulated in a manner which would reasonably cause an employee to conclude that management was involved, and would become aware of who signed it and who did not the Board has generally been unable to find that the statement was voluntary" (also see *Canadian Gypsum Company Limited*, [1980] OLRB Rep. Oct. 1368 in which the circulation of the petition on company premises during working hours in the circumstances of that case resulted in the Board's not being satisfied that "there was not, on the part of the other employees, a perception that the petition ... was linked, or even directed, to management, and consequently that the identity of those who signed or did not sign would come to management's attention"). While the facts of each case are different, under all the circumstances, we conclude that the first petition was not a voluntary expression of the employees' wishes.

23. The second termination petition was filed three months after the first one and, as LeBlanc admitted, was intended to remedy the April petition; he testified that his lawyer had told him the second petition was designed "to play it safe" and that his lawyer had given him "some hints" as to what was wrong with the first one, including obtaining the signatures at the workplace. While still on workers' compensation, he again went to the workplace (this time the LaSalle plant)

and spoke to all the employees there. He obtained the first seven signatures on a single document and says he made no promises to or threats against the signatories. He kept talking to the employees who had not signed and five more employees eventually signed individual statements of desire. All the employees signed in the office of LeBlanc's counsel, before work began. He denied that he was told by management to go to the employees and that he was intimidated or promised a reward in connection with talking to the employees. One employee who signed the second termination petition, testified he had done so "of his own free will". We have taken that testimony into consideration, weighing it against the various incidents which in our view established a climate laden with the employer's negative attitude towards the union.

24. We have doubt that the employees who signed the second termination petition had rid their minds of the inferences they could make from the way in which LeBlanc collected signatures for the first termination petition that management knew about the petition and approved it and that management might find out who signed and did not sign it. This carry-over, coupled with the fact that LeBlanc was again in the plant with respect to the second termination petition while he was on compensation (that fact alone would not have convinced us that the petition was involuntary since apparently "non-working" employees did visit their friends at work), lead us to conclude that the second termination petition was tainted by the circumstances surrounding the first.

25. We wish to make reference to two other issues which occupied much of counsels' efforts. The union alleges that LeBlanc told picketers on the LaSalle line that Mansour was paying the legal fees for the April termination application. We note that the direct relevance of this allegation goes to the voluntariness of the signatures on the first termination petition and not the second; since we have found the April application does not satisfy the test of voluntariness on other grounds, this added factor would at best confirm that conclusion and we accordingly find no need to rule on this issue. There was also evidence led with respect to the union's attempting to convince LeBlanc and Landry to withdraw the petition or sign a revocation. Whatever efforts the union made were unsuccessful. However, there was no allegation of intimidation by the union and nothing prevents their trying to influence the employees in non-coercive ways.

26. Taking into account the lingering impact of the employer's conduct, the presence of LeBlanc in the plant while he was on compensation, the separation of union supporters and non-supporters and the effect of the April petition which we find was not a voluntary expression of the employees' wishes, we find that the applicant in the termination application has not satisfied us that the July signatures were a voluntary expression of the employees' wishes. For all the reasons noted above, we hereby dismiss the application for termination.

27. We are therefore required to consider whether the circumstances of this case satisfy any of the criteria set out in section 40a(2) of the Act which requires us to direct the settlement of a first collective agreement by arbitration where any one or more of the criteria are met.

28. Section 40a(1) and (2) read as follows:

(1) Where the parties are unable to effect a first collective agreement and the Minister has released a notice that it is not considered advisable to appoint a conciliation board or the Minister has released the report of a conciliation board, either party may apply to the Board to direct the settlement of a first collective agreement by arbitration.

(2) The Board shall consider and make its decision on an application under subsection (1) within thirty days of receiving the application and it shall direct the settlement of a first collective agreement by arbitration where, irrespective of whether section 15 [which imposes the duty to bargain in good faith and to make every reasonable effort to make a collective agreement] has

been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of,

- (a) the refusal of the employer to recognize the bargaining authority of the trade union;
- (b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;
- (c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or
- (d) any other reason the Board considers relevant.

29. Section 40a manifests an expectation that if the parties are able to transcend this initial hurdle in their relationship which prevents their reaching a collective agreement, they may be able to develop a healthy collective bargaining relationship. By virtue of section 40a(18), a collective agreement is effective for two years, thereby giving the parties two years to stabilize their relationship. In some cases, the parties involved in a first contract application may be experienced bargainers, but because of circumstances which fit within section 40a(2) have not been able to reach an agreement. In other cases, one or both parties may be inexperienced and as a consequence one of the conditions set out in section 40a(2) results. In the instant case, the union is an experienced participant in labour relations; the employer is inexperienced and, it appears, not fully appreciative of the obligations imposed on him by the *Labour Relations Act* of this province. This will not be an unusual situation for small employers such as Mansour Mining which has approximately fifteen employees. The size of the employer does not absolve him of the responsibility of acquainting himself with his responsibilities, but there may well be cases, as here, where the employer has received poor advice coupled with his own lack of understanding of the Act; in such cases, the imposition of a two-year collective agreement may constitute an environment conducive to the parties establishing satisfactory relations. There may also be situations in which the employer's actions have been instrumental in creating such dissension among the employees that the union has been placed at a disadvantage in negotiating a contract; in such cases, the imposition of a collective agreement may provide the impetus necessary to resolve such difficulties, permitting the parties (and the employees) to get on with the next matters at hand. The common thread underlying these situations is the hope that imposing a collective agreement will leave the parties free to devote their energies to learning how to co-operate with each other and will give the employees an opportunity to learn about union representation, both in a calmer and more stable atmosphere.

30. It is not necessary to decide in this case whether such factors constitute a reason for directing settlement of a first contract by arbitration, or simply constitute a background against which the criteria are assessed, since we believe that bargaining broke down because of the failure of the employer to make expeditious efforts to conclude a collective agreement.

31. The parties' initial efforts at negotiating appeared to be achieving results. After its certification on May 3, 1985, the union, through Roland Gauthier, Local 598's business agent since June 1984, wrote to Mansour, the employer, on May 13, 1985, requesting that negotiations begin. He received no reply to that letter and sent another one to Claude MacMillan on June 25, 1985 who responded on July 3, 1985. On July 23, 1985, Gauthier and Briggs, President of Local 598, met with Mansour and MacMillan in MacMillan's office. At that time, the union gave the employer its own proposals in draft form and requested a wage and benefit structure. The union was told that one employee earned \$6.50 an hour, a few earned \$5.50 and some were at \$4.25 plus. These figures were close to what the employees themselves had told Gauthier their wages were at a meeting between the union and the employees on May 3, 1985. However, between May 3rd and

July 23rd, Mansour had in fact given the employees a \$1.00 raise. After some difficulties and misunderstandings on both sides, including a meeting which the union did not attend, the parties met on October 8, 1985. That meeting lasted about one and a half to two hours and the parties agreed to a good number of the union's draft proposals, but the monetary aspects were left outstanding.

32. MacMillan asked Gauthier to take the discussions they had had about wage increases back to the employees. That night Gauthier met with the employees and told them some of the difficulties with respect to the monetary issues; he took the position that because this was a first contract, the major issue should be job security and that they should look at best at a 4%-5% increase. When the employees argued that they wanted a \$1.00 an hour increase and benefits, Gauthier told them they were not being realistic and again stressed security, as well as safety and health issues. After the meeting, Andrew Paquette and Michel Landry told him about the \$1.00 increase. Gauthier testified that he was "fuming" because MacMillan had specifically asked him to go to the employees on the monetary matters. In November 1985, Gauthier filed a section 89 complaint with the Board. The parties held another meeting on November 20, 1985 and Gauthier again asked for the wage structure; again the employer gave him the figures which applied prior to the June 1st increase. After argument, they agreed to make a collective agreement retroactive to June 1, 1985, incorporating the new wage structure and look at a 5% increase in 1986. The employer said he would have to look at the costs of a benefit package and would get back to the union and MacMillan then suggested that the union redraft the proposals in "legal form", initialling those on which agreement had been reached. (The employer also asked for proposals with respect to part-time workers and for the reinstatement of two employees who had been laid off, Michael Paquette and Robert Gervais.) Gauthier redrafted the proposals and sent the resulting document to the employer. It is to be noted that not only did the employer not dispute the items which Gauthier initialled at the hearing, but stressed that agreement had been reached on them. Gauthier and MacMillan had another general meeting on December 5, 1985 and MacMillan told Gauthier that Mansour, who was not present, would receive a copy of the proposals. Meetings were scheduled for January 21 and 29, 1986, but were cancelled by MacMillan's office. It was not until February 20, 1986 that MacMillan told Gauthier that he would be able to give him Mansour's response by Wednesday of the following week. There was no response on the redrafted proposed agreement.

33. The union was beginning to become concerned about the passage of time, since the one-year period since the date of certification would soon expire and there would be no collective agreement. The union requested a conciliation officer and Gauthier delivered the notice, dated February 28, 1986, by hand to Mansour and MacMillan. At the workplace, Gauthier met Mansour who asked him "what the hell's going on"; Gauthier responded in kind and Mansour said that he had never seen the December package of proposals. In fact, it seems that Mansour did receive the proposals; but he testified that he never read them, that they were simply another piece of paper on his desk. There was no evidence that MacMillan indicated to Mansour the importance of reading and replying to the proposals. The conciliation officer was appointed for May 6, 1986 and arrangements were made for the meeting at the Holiday Inn. The union had booked a caucus room and waited there for the officer. When he did not arrive, Briggs made calls to Toronto to ensure that he had left. At 10:00 a.m., the time the meeting was to begin, Mansour and MacMillan came to the union's caucus room; MacMillan was upset that the officer had not arrived. MacMillan and Mansour left about 10:25 a.m., despite confirmation that the officer had been scheduled for this meeting. Shortly afterwards, the officer arrived, having been delayed by weather, and tried unsuccessfully to call MacMillan and Mansour. Andrew Paquette, also at the meeting, was sent to MacMillan's office to see if he was there, but was told by his secretary that he was at a meeting at the Holiday Inn. Gauthier and Briggs met with the officer for about five minutes at 2:00 p.m. and left the hotel about 3:00 p.m. No contact could be made with either MacMillan or Mansour during the day. A no board report was issued on May 13, 1986.

34. On June 9, 1986, the employees went on strike; however, most of the employees crossed the picket line and went in to work. Both Briggs and Mansour testified that during the strike, they discussed the situation, expressed a willingness to negotiate and Briggs suggested a mediator; Mansour agreed and they shook hands on it. Briggs called Toronto to arrange for a mediator and booked rooms, but Mansour called back and said his lawyer had told him not to negotiate. The next day, according to Briggs, Mansour told him that he was “in the middle” as a result of the filing of the April termination application. The strike was ended as a condition of the interim settlement reached by the parties on June 23, 1986, the date scheduled for the continuation of the hearing into the union’s first section 89 complaint.

35. There were no further negotiations or other developments (except the July 16th termination application) until the union filed its first contract application on August 18, 1986.

36. From the inception of a union presence at Mansour Mining, Mansour appears to have been reluctant to recognize the union’s role as the representative of his employees. We believe this is less a result of ill will than of lack of understanding. Unfortunately, the advice Mansour received with respect to bargaining, at least, was uninformed and rather than helping Mansour understand and come to terms with the new dynamic in his workplace, hindered it. It is clear that Mansour’s general approach to life is to deal with matters directly; unfortunately, that led him to deal directly with the employees during April to June 1985; however, he may have dealt with the union if he had followed his own instincts, as indicated by his shaking hands with Briggs and agreeing to a mediator. But he must be held responsible for failing even to read the union’s “legally” drafted proposals; the result of that failure was that bargaining broke down. We note, too, that the employer refused to negotiate the monetary issues because, he said, he did not know what his costs would be, since he was moving into his new premises. At the hearing, counsel for the employer evidently considered it to his client’s advantage that this same justification had been made in June 1985 and continues to be made. We do not consider it an advantage; on the contrary, we consider it to be a factor contributing to our conclusion that the employer failed to make expeditious efforts to conclude a collective agreement. While we recognize that the LaSalle plant was not in real operation until July or thereabouts of this year, we are not satisfied that full operation was required in order to determine the salaries and cost of benefits for the employees already working for Mansour Mining, regardless of the location. Mansour admitted he did not know whether the union’s proposals were reasonable or not. He was of the view that the union should not expect him to bargain when it showed dissatisfaction with him by calling in a third party, the conciliator (at which point he had had the redrafted proposals in his possession for over two and a half months).

37. Counsel for the union argues that all the criteria under section 40a(2) have been satisfied. Since it is our view that the employer, for the reasons indicated above, has not engaged in expeditious efforts to conclude a collective agreement, we comment only briefly on whether the other criteria have been satisfied within the meaning of section 40a(2). While Mansour did not appear at the beginning to recognize the bargaining authority of the union, he later entered into negotiations with the union. Counsel argued that the failure by Mansour to read the proposals constituted conduct encompassed by section 40a(2)(b). We do not agree that section 40a(2)(b) is meant to include that type of conduct, but rather refers to a “bargaining position”. Such conduct is relevant to section 40a(2)(c), however. Counsel further argued that the unfair labour practices, the decertification application and the segregation of the employees all constitute “any other reason” the bargaining broke down. While these factors all contributed to the climate at the workplace and may be relevant to the union’s inability to build support among new employees, they do not explain why the process of collective bargaining was unsuccessful. In this regard, we adopt the comments made by the Board in *Nepean Roof Truss Limited*, [1986] OLRB Rep. July 1005, that “section 40a contemplates a cause-and-effect oriented assessment”.

38. After hearing all the evidence and seeing the major actors (union representatives and Mansour) testify, we are of the view that a collective agreement will permit the parties a new opportunity to try to establish a satisfactory working relationship. It will eliminate the confusion which has marked the union's presence at Mansour Mining, both with respect to Mansour himself and among the employees. We encourage Mansour to acquaint himself with the realities of bargaining and with the union's role at his company. We believe he wants to make his company work, not become embroiled in management-union games. And we believe the employees simply want to get on with their own jobs. Once a collective agreement is in place, all participants can continue with their responsibilities and obligations to each other.

39. Accordingly, we direct the settlement of a first collective agreement by arbitration.

40. There remain the section 89 allegations. We note that the employer has the onus on these issues by virtue of section 89(5) of the Act. Counsel for the union made submissions with respect to the section 89 complaints in conjunction with his submissions on the termination and first contract applications. With respect to the first section 89 complaint, the following allegations have been made: Donald Pilon was threatened by Mansour if he came to testify at the May 8, 1986 hearing; the \$1.00 raise contravenes section 79 of the Act; and the failure to make reasonable effort to reach an agreement contravenes section 15 of the Act. In addition, originally there had been allegations with respect to Michael Paquette and Robert Gervais who had been laid off but were subsequently rehired as a consequence of the June 23rd settlement; the union still seeks compensation for their layoffs and reinstatement with security. The union further requests union dues for all employees and interest on the dues; compensation to members of the bargaining committee for the failure of the company to bargain in good faith plus expenses incurred by members of the bargaining committee. With respect to the second section 89 complaint, the union seeks compensation for Ralph Wirnsperger for the loss of his employment and reinstatement; claims an attempt to bribe Andrew Paquette was made with respect to his not participating in the strike; seeks removal from the records of Pilon, Gervais, Andrew Paquette and Michael Paquette of Incident Reports dated July 10, 1986; and seeks a \$1.00 raise for Michael Paquette who was never granted the \$1.00 raise which went to the other employees.

41. We continue to reserve on the section 89 complaints in the hope that the parties can resolve them in the process of settling the first collective agreement and in the interests of releasing our reasons on other matters. However, we remain seized of these complaints with respect to liability and remedy, in accordance with submissions made to us during these days of hearing, should the parties not be able to reach an agreement.

0911-86-U; 0998-86-U; 0868-86-U The Metropolitan Plumbing and Heating Contractors Association, a division of the Mechanical Contractors Association Toronto, Frank Michelucci, Derwent Lewis, and Jack McCarron, Complainants, v. Sean O’Ryan; The United Association of Journeymen and Apprentices of the Plumbing & Pipe Fitting Industry of the United States & Canada, Local 46; Metropolitan Plumbing Contractors Association; Urban Mechanical Contractors Limited; Zentil Plumbing and Heating Co. Ltd.; Lou Pupolin Plumbing & Heating Co. Ltd.; Brady & Seidner Ltd.; DiMarco Plumbing & Heating Co. Ltd.; Keele Plumbing & Heating Ltd.; Municipal Plumbing & Heating Ltd.; Cesan Mechanical Systems Ltd.; D. Zentil Mechanical Ltd., Respondents; Metropolitan Plumbing and Heating Contractors Association, a division of the Mechanical Contractors Association Toronto, Applicant, v. Sean O’Ryan; The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46; Urban Mechanical Contractors Limited; Zentil Plumbing and Heating Co. Ltd.; Lou Pupolin Plumbing & Heating Co. Ltd.; Brady & Seidner Ltd.; DiMarco Plumbing & Heating Co. Ltd.; Keele Plumbing and Heating Ltd.; Municipal Plumbing & Heating Ltd., Respondents

Accreditation - Evidence - Reconsideration - Delay in seeking production of documents not fatal due to lack of formal discovery procedure - Application for reconsideration of decision that certificate of accreditation is final and conclusive for all purposes dismissed - Certificate not merely raising rebuttable presumption of bargaining rights

BEFORE: *Harry Freedman*, Vice-Chairman, and Board Members *D. A. MacDonald* and *N. Wilson*.

APPEARANCES: *G. Grossman*, *W. J. McCarron* and *D. Lewis* on behalf of the complainants/applicant; *M. E. Geiger*, *Howard Roher*, *Edward J. Winter* and *Martin Rosenbaum* on behalf of Metropolitan Plumbing Contractors Association, Urban Mechanical Contractors Limited, Zentil Plumbing and Heating Co. Ltd., Lou Pupolin Plumbing and Heating Ltd., Keele Plumbing and Heating Ltd., DiMarco Plumbing and Heating Co. Ltd., Municipal Plumbing and Heating Ltd., Cesan Mechanical Systems Ltd., D. Zentil Mechanical Ltd.; *L. C. Arnold* and *V. McNeil* on behalf of Sean O’Ryan and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46; no one appeared on behalf of Brady & Seidner Ltd.

DECISION OF THE BOARD; October 10, 1986

1. When the hearing in this matter resumed on September 26, 1986, Mr. Grossman and Mr. Geiger made submissions with respect to the production of certain documents referred to in summonses to witness that had been issued with respect to members of the Board of Governors of the Mechanical Contractors Association Toronto. Following the submissions of counsel, the Board recessed to consider those submissions and then returned and issued the following oral ruling:

The Board has received submissions this morning with respect to the production of certain documents, some of which were specifically referred to in an endorsement in a summons to witness directed to the members of the Mechanical Contractors Association Toronto Board of Governors, and other

documents that might be considered as being caught by what counsel for the corporate respondents refers to as the “basket clause” in that endorsement to the summons.

Additionally, counsel for the corporate respondents sought production of additional documents in two broad categories, one being documents relating to the Metropolitan Plumbing and Heating Contractors Association and the other being documents relating to the attempt by a group of low-rise residential contractors to join the Mechanical Contractors Association Toronto. Counsel for Local 46 and Sean O’Ryan supported that request.

Counsel for the complainants/applicant resists the production of those documents because they are not relevant, and counsel have simply waited too long to make the request. Furthermore, counsel stated categorically that he and his clients have reviewed the records of the Metropolitan Plumbing and Heating Contractors Association, division of Mechanical Contractors Association Toronto and have produced all documents relating to the Metropolitan Plumbing and Heating Contractors Association.

With respect to the documents relating to the Metropolitan Plumbing and Heating Contractors Association, we have no reason to doubt the word of counsel. Therefore, we are not making any direction with respect to such documents, if any, notwithstanding the suspicions of both counsel for the respondents.

As for the other documents, we are satisfied that they are, at the very least, arguably relevant to the case. We are not persuaded that the failure of counsel to ask for them earlier precludes them from seeking production of the documents now.

This is a complex case. No formal discovery procedure exists at the Board. In effect, counsel are in the position of both discovering the other side as well as dealing with the case as it is being presented. Therefore, we believe that counsel, upon becoming aware of the existence of certain documents that were not produced earlier, are entitled to have them produced since they are at least arguably relevant.

Therefore, we direct that the documents relating to the attempt by a group of residential low-rise contractors to join the Mechanical Contractors Association Toronto be produced. We also direct the production of the documents explicitly listed in the summons to witness, but only relating to the time period from June 17, 1986 to the date of the filing of the latest complaint in this matter. However, no minutes of meetings that relate to the Mechanical Contractors Association Toronto conduct of this litigation, whether counsel was present or not, is to be produced. Of course, any privileged documents need not be produced.

Production is to be made by not later than 4:00 p.m. on October 14, 1986, which is one week before the next scheduled hearing in this matter.

2. Counsel for the corporate respondents sought reconsideration of the Board’s decision given orally at its hearing on September 9, 1986 that was issued in writing on September 18, 1986.

After hearing the submissions of Mr. Geiger, the Board recessed, considered those submissions and returned and gave the following oral ruling:

It is not necessary to hear counsel for the complainants/applicant.

Counsel for the corporate respondents seeks reconsideration of the Board's decision made at its hearing on September 9, 1986 which was reduced to writing and issued on September 18, 1986. Counsel for Local 46 and Sean O'Ryan takes no position on Mr. Geiger's request.

Mr. Geiger submitted that the Board appeared to have misapprehended the argument made by him. He submitted that the Board must determine, as a matter of fact and law in this proceeding whether the Board's certificate of accreditation was valid or was a nullity. That determination is necessary in order to decide whether section 131 or section 132 of the Act have been violated.

We are satisfied that we understood precisely what counsel argued before us then and what he argued again before us today. Counsel submitted that the validity of the accreditation certificate is an issue raised by counsel's client in defence to the complaint and application for consent to prosecute made by the complainants/applicant, and therefore, the Board must decide in this case whether the Board acted within its jurisdiction when it issued the accreditation certificate.

Counsel referred to several authorities which stood for the principle that a tribunal errs if it does not determine what is necessary to be determined in a proceeding before it. See: *Rex v. Judge Pugh, ex parte Graham*, [1951] 2 All E.R. 307 (K.B.D.); *Regina v. Saskatchewan Labour Relations Board et al., ex parte Smith-Roles Ltd.* (1969), 10 D.L.R. (3d) 273 (Sask. Q.B.); *Re MacKay Construction Ltd. and Local 721C, International Union of Operating Engineers* (1971), 21 D.L.R. (3d) 485 (P.E.I.S.C.); *Re Civil Service Association of Ontario (Inc.) and Ontario Council of Regents for Colleges of Applied Arts & Technology* (1974), 50 D.L.R. (3d) 506 (Ont. Div. Ct.).

Counsel submitted that he is entitled to raise the validity of the certificate of accreditation as an issue and relies principally on the decision of the House of Lords in *Director of Public Prosecutions v. Head*, [1958] 1 All E.R. 679.

As we indicated in our previous decision, we are satisfied that the Board's certificate of accreditation is, by reason of section 106(1) of the *Labour Relations Act*, final and conclusive for all purposes, unless it is subsequently revoked or reconsidered by the Board or quashed by a court of competent jurisdiction.

That certificate created bargaining rights. We do not believe it is necessary or appropriate, for the reasons expressed in our previous decision, to determine in this proceeding whether another panel of the Board made a jurisdictional error when it issued that certificate. That certificate was issued by the Board in a proceeding before it. Whether issued correctly or not is not a con-

cern of ours in this proceeding by reason of section 106(1) of the *Labour Relations Act*.

As for the decision of the House of Lords in *Director of Public Prosecutions v. Head, supra*, it appears to us that the House of Lords treated a certificate issued under the *Mental Deficiency Act, 1913* as merely establishing a rebuttable presumption of mental deficiency. Lord Tucker wrote at page 686 of the report:

"In my view, on proof that a girl is detained as an inmate in one of the specified institutions and is under care or treatment therein as a defective or is shown by the production of the licence to be out on licence from one of those places to which the system of licences under the Act is applicable, that *is prima facie proof* that she is a defective lawfully under care or treatment as such, and I think the Attorney-General - if I correctly understood him as previously stated - was assuming an unnecessary burden if he meant that it is incumbent on the prosecution in all cases under s. 56 to satisfy a jury by medical evidence that the girl in question comes within one or other of the categories specified in s. 1. I think this is to be presumed. But the foundation for the presumption, in the case of a person under detention or on licence, is the legality of the detention and the necessity for a licence to justify the patient's absence, and, if it is shown and admitted, as in the present case, that, on the face of the documents produced and received in evidence without objection, the detention was illegal, the whole basis of the sub-section and the presumption of defectiveness goes and the prosecution must fail. I do not think anything more than what I have stated above is required to establish a *prima facie* case, but it is right and proper that the prosecution should have in court, and make available for inspection by defending counsel, the relevant orders or other documents on which the detention is based, so that, in a proper case, and subject to questions of admissibility in evidence, *the presumption of legality may be rebutted*."

[emphasis added]

However, in the absence of any reference to a section in the *Mental Deficiency Act, 1913* comparable to section 106 of the *Labour Relations Act*, the reasoning in that case is, in our respectful opinion, distinguishable. In our view, a certificate of accreditation does not merely raise a rebuttable presumption of bargaining rights. Rather, section 106(1) of the Act explicitly states that such a decision is *final and conclusive* for all purposes. Therefore, if the certificate of accreditation is conclusive for all purposes, no question of whether it validly created bargaining rights can be raised as an issue in another proceeding before the Board.

The application for reconsideration is hereby dismissed.

3. It became apparent during the course of the hearing that insufficient days had been scheduled for the continuation of this matter. Therefore, at the end of the hearing on September 26th, the Board fixed additional hearing dates.

4. This matter is referred to the Registrar to be re-listed for hearing before this panel of the Board, in addition to the dates already listed for hearing set out in paragraph 7 of the Board's decision of August 5, 1986, on January 26, 27, 28, 29, February 2, 3, March 2, 3, 4, 5, 9, 10, 11 and 12, 1987.

1469-84-R Metropolitan Toronto Sewer and Watermain Contractors Association, Applicant, v. International Union of Operating Engineers, Local 793, Respondent, v. The Ontario Formwork Association, Intervener #1, v. Metropolitan Toronto Road Builders' Association, Intervener #2, v. A Group of Independent Contractors, Intervener #3, v. Ontario Concrete and Drain Contractors Association, Intervener #4

Accreditation - Bargaining Unit - Earlier decision describing appropriate bargaining unit - Board establishing general guidelines for deciding the composition of the employer unit and the related lists of employers and employees as required by s.127

BEFORE: *N. B. Satterfield*, Vice-Chairman, and Board Members *J. Wilson* and *H. Kobryn*.

APPEARANCES: *G. W. Adams* for the applicant; *S.B.D. Wahl* and *E. A. Ford* for the respondent; no one appearing for intervener #1; *S. C. Bernardo* for intervener #2; *Bruce Binning*, *Daniel Fryzuk* and *Wes Lippett* for intervener #3; *Hercules E. Faga* for intervener #4.

DECISION OF THE BOARD; October 15, 1986

1. This is an interim decision issued for the purpose of confirming a unanimous oral ruling of the Board made on September 4, 1986 in a hearing into this application for accreditation made pursuant to section 125 of the *Labour Relations Act*. The Board had issued a decision dated August 21st, 1986, which included a description of the unit of employers found by the Board to be appropriate for collective bargaining. The decision also directed that hearings into the remaining issues continue on dates which had previously been set for the application.

2. When the hearings were reconvened on September 3rd, 1986, the first of those dates, the parties made submissions to the Board respecting how to proceed with certain of the remaining issues and requesting clarification of a reference in paragraph 6 of its August 21st decision respecting certain evidence the Board had received. On September 4th, the Board rendered the following unanimous ruling which is hereby confirmed:

The Board has reviewed and considered the submissions of the parties respecting how the Board should proceed to determine:

- (1) the list of employers who would be included in the unit of employers described in paragraph 4 of the Board's August 21st decision; and
- (2) the list of employers included in (1) above who, within one year prior to the date of making of this application, have had employees in the sewers and watermain sector in Board area #8.

There was consensus in the parties' representations that the Board should establish general criteria for the purpose of making those determinations. It was submitted that the criteria should include the basis for deciding whether the respondent held bargaining rights in the sewers and watermain sector in Board area #8 and the scope of the work encompassed by the unit of employers. According to the parties, such criteria are essential to them knowing whether to accept or challenge a claim that a particular employer is included in or excluded from the unit, or whether a particular employer has had employees in the sewers and watermain sector in Board area #8 during the weekly pay period immediately preceding the date of the application.

This latter determination is required by section 127(c) of the *Labour Relations Act*.

In the Board's view, having regard to the parties' representations, the evidence previously before the Board in these proceedings, and the parties' submissions on the bargaining unit issue made to the Board at the hearing on August 8, 1986, the issues relating to the composition of the unit of employers described in paragraph 4 of the August 21st decision may be described generally in the following terms. There is no issue amongst the parties that employers installing main and/or lateral sewers and watermains along public roads, easements or allowances are doing work coming within the sewers and watermains sector. There is an issue of whether employers doing the same work within private property lines, regardless of the ultimate use of the property, are doing work coming within the sewers and watermains sector. There is another issue of whether the installation of main and/or lateral sewers and watermains when done in conjunction with other work such as road-building or installing of duct work which will carry telephone or electric power lines, whether along public roads, easements or allowances or within private property lines. Finally, there is an issue of whether the installation of duct work which will carry telephone or electric power lines, when done separately from the installation of main and/or lateral sewers and watermains, whether along public roads, easements or allowances or within private property lines, is work coming within the sewers and watermains sector.

Having regard to those general issues and to the determinations required of the Board by section 127 of the Act, the Board considers it appropriate in this application for accreditation to establish some general guidelines for purposes of deciding the composition of the employer unit and the related lists of employers and employees. This is consistent with the Board's practice of establishing guidelines, such as its 30-day rule, for deciding in certification applications whether employees were at work in the bargaining unit at the making of the application. While such guidelines may establish a general rule, particular circumstances may warrant an exception to them. Therefore, based on the evidence before the Board of the practice of the parties and employers under the collective agreements upon which they are relying to establish their respective positions in these proceedings, the Board will apply the following guidelines in making the determinations required by clauses (a) and (c) of section 127.

First, with respect to employees of employers who have been served with notice of these proceedings, the Board will accept as proven that the respondent holds bargaining rights in the sewers and watermains sector in Board area #8 for those employees as asserted by a party to these proceedings in their pleadings, except where the claim has been challenged by a party appearing or by an employer in its return filed with the Board. In either exception, the Board will want to be satisfied by further evidence that the respondent has the bargaining rights asserted.

Second, as a general rule, the Board will consider employers of employees for whom the respondent has bargaining rights in Board area #8 in the sewers and watermains sector who are performing the following work in Board

area #8 to be doing work coming within the unit of employers found by the Board to be appropriate for collective bargaining:

The installation of main and/or lateral sewers and their appurtenances for the collection and transportation of sewage and storm water and main and/or lateral watermain and their appurtenances for the supply of water, whether installed in conjunction with any other works or services, along public roads, easements or allowances or within private property lines up to three feet of any building or structure, regardless of the ultimate use of the private property.

1013-86-R and others on Schedules "A" and "B"; 1015-86-U and others on Schedule "C"; 1175-86-R; 1176-86-R; 1177-86-U; 2313-84-R; 2314-4-R; 2315-84-R; 2316-84-R; 1178-86-R; 1179-86-R; 1181-86-R; 1182-86-R; 1180-86-U; 1183-86-U Retail, Wholesale and Department Store Union - Local 414, AFL-CIO-CLC, Applicant, v. Willett Foods Limited, c.o.b. as **Mr. Grocer**, Domgroup Ltd., Hollinger Inc., Conrad Black, and all respondents listed on Schedule "A", Respondents; Termarg Food Services Limited, Stalba Enterprises Inc., Carma Groceries (Ontario) Inc., 548082 Ontario Limited, 568429 Ontario Limited, Ron Nelson's Foods Ltd., Jorfy Foods Inc., Read-Wentworth Markets Ltd., Stroudal Marketing Ltd., 571726 Ontario Inc., W & J Holdings Limited, R.G.T. Marketing Limited, Stonegate Marketing Ltd., Kerland Foods Ltd, 578588 Ontario Inc., 580265 Ontario Limited, 580266 Ontario Limited, Jules Foods Limited, 579679 Ontario Inc., Lars Persson Active Marketing Inc., Challis Groceries Limited, Applicants, v. Retail, Wholesale and Department Store Union - Local 414, AFL-CIO-CLC, Respondent; Retail, Wholesale and Department Store Union - Local 414, AFL-CIO-CLC, Applicant, v. Willett Foods Limited, c.o.b. as Mr. Grocer, Domgroup Ltd., Hollinger Inc., Conrad Black, and all respondents listed on Schedule "C", Respondents; Retail, Wholesale and Department Store Union - Local 545, AFL-CIO-CLC, Applicant, v. Willett Foods Limited, c.o.b. as Mr. Grocer, Domgroup Ltd., Hollinger Inc., Conrad Black, 510688 Ontario Limited and Claude Brunet, Respondents; Retail, Wholesale and Department Store Union - Local 545, AFL-CIO-CLC, Complainant, v. Willett Foods Limited, c.o.b. as Mr. Grocer, Domgroup Ltd., Hollinger Inc., Conrad Black, 510688 Ontario Limited and Claude Brunet, Respondents; Retail, Wholesale and Department Store Union - Local 579, AFL-CIO-CLC, Applicant, v. Willett Foods Limited, c.o.b. as Mr. Grocer, Domgroup Ltd., Hollinger Inc., Conrad Black, 510647 Ontario Limited, Saul Kansala, Janet Kansala, 510662 Ontario Inc., Romeo Sauve and Diane Sauve, Respondents; Retail, Wholesale and Department Store Union - Local 579, AFL-CIO-CLC, Applicant, v. Willett Foods Limited, c.o.b. as Mr. Grocer, Domgroup Ltd., Hollinger Inc., Conrad Black, 510647 Ontario Limited, Saul Kansala, Janet Kansala, 510662 Ontario Inc., Romeo Sauve and Diane Sauve, Respondents

Parties - Reconsideration - Related Employer - Unfair Labour Practice - Whether Conrad Black and Hollinger Inc. should be added as respondents in s.1(4) and 89 complaints - Earlier panel in *Termarg* denying addition - Whether Board will reconsider earlier decision - Board applying principle of *res judicata* - Whether those who actively control a corporate employer personally or vicariously liable - When Board will dismiss s.1(4) application before hearing respondent's evidence

BEFORE: *Owen V. Gray*, Vice-Chairman and Board Members *F. C. Burnet* and *R. R. Montague*.

APPEARANCES:

James Hayes, James Carpick, Robert McKay and *D. G. Collins* for Retail Wholesale and Department Store Union, Locals 414, 545 and 579.

Richard Nixon for Bo-Ma Co. Ltd., Charles Cornelius Postma, 590105 Ontario Limited, Frank Dam, Theodorea Margaret Dam, Robert D. Bell Investments Inc., Robert Donald Bell, Corine Kay Bell, 607099 Ontario Inc., Roger Percy Hein, Ellen Betty Hein, 597077 Ontario Inc., Ronald Stothers, 580265 Ontario Limited, Joseph John Dilello, Nicholas Anthony Giannini, Alexander Kilfin, 580266 Ontario Limited, Richard Petelka, Anthony Russo, 579679 Ontario Inc., Garnet James Reid, William Francis Deschamps, Stroudal Marketing Ltd., Edward James Stroud, Alain Pierre Lebrun, Levon's Groceries Inc., Michael Vincent Levon, 597060 Ontario Inc., Michael Sciarra, Joseph Finella, David Sciarra, Peter John Jurmain, 568429 Ontario Ltd., David Joseph Robert, Larry Howard Deschamps, 659651 Ontario Limited, Graham Arnold, W & J Holdings Limited, Wesley Victor Spurrell, Myrtle Joy Spurrell, Termarg Food Services Limited, Terence Joseph Nicol, Stonegate Marketing Limited, Egon Pototschnik, 659484 Ontario Limited, Andrew Morris McLennan, Gerald Edward Michael Finley, G. E. Shaw Foods Limited, George E. Shaw, 578588 Ontario Inc., Anthony Zezza, Rosina Zezza, Anthony Pietro Reda, Susan Elizabeth Reda, Mijon Foods Inc., Maurice Vivion D'Arcy, Rosalind Frances D'Arcy, Gatestone Marketing Limited, Robert Ahearn, 651423 Ontario Limited, Angelo Vento, George Jovanovich, Richard Weiditch, R.G.T. Marketing Limited, Gerald Russell Taylor, Herbert Russell Taylor, Samkeiken Foods Inc., William John Shudlock, 657041 Ontario Inc., Frank Balsamo, Brian Shewell, Ed Poirier Foods Limited, Edward Poirier, M & T Grocers Ltd., Michael Santeramo, Annette Santeramo, C.G. McMullen Grocers Ltd., 660401 Ontario Inc., Mark Dzugan, Challis Groceries Limited, Larry E. Challis, Diane Challis, 510688 Ontario Limited, Claude Brunet, 510647 Ontario Limited, Saul Kansala, Janet Kansala, 510662 Ontario Inc., Romeo Sauve, Diane Sauve and 650287 Ontario Limited.

James E. Bowden for 587266 Ontario Limited, William R. Anderson, Marianne Anderson, John S. Manderson, Dianne Manderson, Jofry Foods Inc., Doris Gyorffy, Robert Gyorffy, Robert Moulder, Ron Nelson's Foods Ltd., Ronald John Nelson, Stalba Enterprises Inc., Steven Alfred Bartley, Carma Groceries (Ontario) Inc., Roger Black, Jules Foods Limited, Josef Jan Robert Gwiazda, Julie Ann Gwiazda.

Colin D. McKinnon for 548082 Ontario Limited, David Stephen Lockett, Betty Ruthe Lockett, Karsmor Limited, William Aldrich, Elsie M. Aldrich, Thomas Morrow, GGW Enterprises Ltd., Rico Gelano, Linda Gelano, Frank Winkel, Wingil Foods Enterprises Ltd., Petcol Foods Limited, Peter LaRose, Colleen McGee, 125913 Canada Inc., Herbert Willar, T. H. Sims, 652668 Ontario Inc., Gani Vata.

C. E. Humphrey and *Martin Rosenbaum* for Read-Wentworth Markets Ltd., Michael Read, Susan M. Read, Dennis Read, Elizabeth Read.

R. C. Filion for Willett Foods Limited and Domgroup Ltd.

Wm. R. Patchett for 599872 Ontario Inc., William Reginald Patchett, 370801 Ontario Limited, Delphine Patchett, William Patchett Jr., 653862 Ontario Inc.

R. A. Spence for C. M. Black.

R. P. Armstrong and *P. D. Jackson* for Hollinger Inc.

Wm. S. Challis for Dave Kusluski, Carol Hull, Steve Borzuch, Leslie MacLean, Margaret Forma, John MacKenzie, Joyce Valliere, William Ariss, Jeffrey Sywyk.

Barb Walter for Pannell Kerr Forester Inc., trustee in bankruptcy of Kerland Foods Ltd.

No one appearing for Ronald John Boan, J. & L. Hayden Enterprises Ltd., Jack Hayden, Lillian Hayden, Lars Persson Active Marketing Inc., Lars Persson, Iris Persson, Kerland Foods Ltd., John D. Kerr, Joan N. Rowland, 134805 Canada Inc., Lawrence Henry Taylor, J. E. Taylor, Ronald J. Hannah Holding Co. Ltd., Ronald J. Hannah, Antonio Agozzino, Bob Jackson Foods Ltd., Robert Jackson, Wayne Allen Hamilton, 571726 Ontario Inc., James Roland Grandy, Carl George McMullen, Nicholas Anthony Giannini, Joseph John Dilello.

DECISION OF THE BOARD; October 1, 1986

1. The question addressed in this decision is whether either or both of Conrad Black ("Black") and Hollinger Inc. ("Hollinger") should be or remain respondents in these proceedings.

I

2. Each of Locals 414, 545 and 579 of the Retail, Wholesale and Department Store Union ("the unions") has bargaining rights for a unit of employees of Domgroup Ltd., which until April of this year was known as Dominion Stores Limited and will hereafter be referred to as "DSL". Willett Foods Limited ("Willett"), a subsidiary of DSL, is the franchisor of "Mr. Grocer" super-market operations. Some of the respondents are the franchisees or former franchisees of over 50 Mr. Grocer stores currently operating in the geographic areas in which the unions have bargaining rights for DSL employees.

3. As against each respondent franchisee in the geographic area in which it has bargaining rights for DSL employees, each union seeks a declaration, under section 63 of the *Labour Relations Act* ("the Act"), that the transactions by which that respondent came to be operating a super-market or supermarkets under the Mr. Grocer name in that area constituted one or more sales of what was initially a part of DSL's business, and that, accordingly, the union has bargaining rights for the employees of that franchisee and that franchisee is bound by the terms of the union's collective agreement with DSL and has been bound by those terms since it began operating a Mr. Grocer store. Certain of the respondent franchisees have applied under subsection 63(5) of the Act, and employees of certain of the respondent franchisees have applied under subsection 57(2) of the Act, to terminate the bargaining rights which are alleged to affect them. We are not concerned with any of these claims in this decision, and the history of their filing will not be reviewed in the recital of background which follows.

4. As against DSL, Willett and all respondent franchisees in the area for which it holds bargaining rights for DSL employees, each union seeks a declaration or declarations, under subsection 1(4) of the Act, that those respondents all constitute one employer for the purposes of the Act, were all bound at all material times to apply the terms of the union's collective agreement with DSL to a single bargaining unit consisting of all persons employed in grocery stores operated by any one of them and are all jointly and severally liable for any past (or future) failure of any of them to apply the collective agreement in that way. Each union also complains under section 89 of the Act of unfair labour practices in the promotion and implementation of the Mr. Grocer franchise programme and the operation of the Mr. Grocer franchises in the relevant area. It is in respect of these claims under subsection 1(4) and section 89 that the trade unions would have Black and Hollinger be and remain respondents.

5. In July 1983, Local 414 filed a section 89 complaint and applications under section 63

and subsection 1(4) with respect to the first franchising of a Mr. Grocer operation at 666 Burnhamthorpe Road, Mississauga. It named DSL, Willett and the franchisee, Penmarkay Foods Limited, as respondents. The franchisee filed an application under subsection 63(5) shortly thereafter. Those matters were heard together beginning in September 1983, and resulted in the September 1984 decision in *Penmarkay Foods Limited*, [1984] OLRB Rep. Sept. 1214. The filing by Local 414 of further subsection 1(4) applications with respect to other Mr. Grocer stores began in March 1984. Each such application focused on one franchise location, naming as respondents DSL, Willett and the person thought by the applicant union to be the franchisee at that location. Local 414 had filed 31 such additional subsection 1(4) applications by the end of December 1984. Local 579 filed subsection 1(4) applications with respect to one location in Sturgeon Falls and two locations in Sudbury in November and December 1984.

6. Some time after the decision in *Penmarkay Foods Limited*, *supra*, was released, the subsection 1(4) and related applications affecting the Mr. Grocer operation franchised to Termarg Foods Services Limited ("Termarg") were scheduled for hearing in March 1985. On February 13, 1985, Local 414 filed a section 89 complaint. That was the second section 89 complaint to be filed with respect to the franchising of a Mr. Grocer operation. It named DSL, Willett and Termarg as respondents. On March 18, 1985, a few days before the initial hearing date set for the proceedings involving Termarg, counsel for Local 414 wrote a letter to the Board stating that it was amending its application and complaint in those proceedings to add Argcen Holdings Inc. ("Argcen"), Argus Corporation Limited, ("Argus"), G. Montegu Black and Conrad M. Black ("the Blacks"). This was resisted by the proposed respondents. After requiring and receiving particulars of the nature of Local 414's claims against those proposed respondents, a differently constituted panel of the Board (hereafter referred to as "the Termarg panel") heard the submissions of counsel for Local 414, the proposed respondents, DSL, Willett and Termarg on the question whether the proposed respondents should be added. The Termarg panel decided they should not: *Termarg Food Services Limited*, [1985] OLRB Rep. March 516. Because the contents of that decision ("the Termarg decision") are so central to the issues before us, the relevant paragraphs are set out here in full:

2. The applicant to these section 1(4) and 89 proceedings seeks to add as respondents the corporations Argcen Holdings Inc. and Argus Corporation as well as individuals Conrad and Montegu Black. The addition of the corporations is on the basis of an alleged re-organization on or about August 30, 1984, in which the respondent Dominion Stores Limited was to become 100 per cent owned by Argcen, which in turn is said to be a company under the control and direction of the Argus Corporation. The basis for adding the Blacks is essentially the allegation that they in one way or another, as major shareholders in Argus, or as officers and directors of the various Argus companies (including Dominion), direct and control the activities of Dominion Stores Limited. The applicant relies as well on published media accounts of direct involvement in the affairs of Dominion on such matters as the firing of its President, John Toma. In addition to these corporate developments already referred to, the applicant points to the recent sale of a substantial number of Dominion's stores to competitor A & P, together with other real property that previously had housed the head office and distribution facilities for Dominion Stores Limited.

3. While the Board can understand the applicant's concern over the impact on its current litigation of the events recently unfolding around it, the fact is that the respondent "Dominion Stores Limited" has apparently been operated for a good deal longer than the events in question as a subsidiary of the Argus group of companies. There is nothing new in that. More importantly, Dominion Stores Limited was, at the time of franchising, the corporate entity carrying on the business in question for that group, and continues to do so today, whether on the basis of the remaining 41 stores operated by it under its own name, or, as this application alleges, through its franchised "Mr. Grocer" stores as well. The applicant at the hearing advanced a number of credible concerns in support of its request to the Board to add additional parties, but its desire to insure the results of its various legal proceedings by way of further "deep pockets" did not emerge until counsel for Dominion tabled with the Board an earlier letter from counsel for the

applicant. That letter asked that the applicant be furnished with a guarantee that the additional corporations and individuals now sought to be added as respondents would honor any claims arising from the instant proceedings. The applicant stated its position as follows:

"We are currently actively reviewing, among other things, the possibility of seeking to name additional parties to the imminent Ontario Labour Relations Board proceedings which would include a corporation or corporations related to Dominion, and also the principal shareholders or persons in control of the corporations in their personal capacities.

Naturally we are quite anxious to avoid spawning additional grounds for controversy which may be unnecessary. There would clearly be no need to pursue such a course of action should the corporate and individual principals be prepared to provide us with a written guarantee that they would honour any claims which may be asserted whether or not Dominion continues in business."

4. The Board in the relatively recent case of *Total Marketing Incorporated*, [1983] OLRB Rep. April 616, expressly addressed the issue of attempting to use section 1(4) of the Act solely as a means of collecting from a "deeper pocket", where that other "pocket" is not itself engaging in the business to which the Union's bargaining rights attach. The Board wrote:

The facts are not in dispute. The applicant has a bargaining relationship with Sepcographics Incorporated, which is a wholly owned subsidiary of the respondent Total Marketing Incorporated. In an arbitration award dated August 21, 1981, it obtained an order for the payment of \$3,403.39 against Sepcographics Incorporated. Sepcographics Incorporated was insolvent at the time of the arbitration and subsequently made an assignment in bankruptcy. The full amount of the arbitration award remains unsatisfied. By this application the applicant seeks to put itself in a position to realize its arbitration award, now registered in the Court as a judgment debt, against the respondent Total Marketing Incorporated.

The material before the Board establishes that the two corporate entities are under common control and direction, and would qualify as related companies within the meaning of section 1(4) of the Act. This is not a case, however, where the Board should exercise its discretion to declare that Total marketing Incorporated is a related employer for the purposes of the Act.

It is clear that Sepcographics Incorporated has ceased operations, and that the work which it performed is no longer being done. There has been no transfer of work, and in that sense no undermining or erosion of the applicant's bargaining rights. If it appeared on the material before us that the respondent had spun off a similar company to do identical work the case might be more compelling for relief, whether by way of declaration of successorship under section 63 of the Act or by the application of section 1(4). In those circumstances the Board could, by the operation of section 1(4) pierce the corporate veil in the interests of protecting the bargaining rights. (See e.g., *Devon Studio*, [1980] OLRB Rep. July 961). Those facts are not shown in the instant case. The purpose of section 1(4) of the Act is to preserve bargaining rights. It is not intended to give a party to a collective agreement the right to a "deep pocket" recovery of an unsatisfied debt against a related corporation.

The *Labour Relations Act* is predicated on the free choice of employees. It is also drafted in contemplation of the existing economic order, with due allowance for the realities of commercial law, including principles of limited liability for corporations. While section 1(4) provides an exception to that law for a limited purpose, that purpose must always be kept in mind. The section was not intended to extend bargaining rights, nor should it be used to extend the liabilities that arise under them, when bargaining rights have not in fact been transferred or undermined. (cf. *Re Cassin-Remco Ltd.*, [1980] 105 D.L.R. (3d) 138 (Ont. H.C.)). The Board should not generally allow a union with bargaining rights for the employees of a subsidiary to use section 1(4) to automatically obtain a declaration that its bargaining rights extend to the parent company and its employees, or to a sister company. We do not see why the consequences

should be any different simply because the subsidiary has become insolvent. (cf. *Chandelle Fashions*, [1982] OLRB Rep. June 828 at 848-49).

The Board is not without sympathy for the hardship suffered by the applicant. It is left with an uncollectable bad debt. That result, however, is a risk that unions and employees have always assumed like all participants in the economic marketplace. Whether employees of a bankrupt subsidiary or their union should have a claim for an unpaid debt against a parent company that is solvent is a policy question of substantial consequence best resolved legislatively. It is not a result that should, absent clear and unequivocal language in the Act, be ushered in by this Board through a novel interpretation or application of section 1(4)."

5. That case has equal application to the matter before us. Apart from the application, where appropriate, of section 1(4) of the Act, the law recognizes the separate identity of each individual corporate entity, notwithstanding that a corporate entity in fact can act only through individuals, and may be controlled to a greater or lesser extent by other corporate entities, whether through the ownership of its shares or through the existence of common officers or directors. Here, as in the *Total Marketing* case, there is no allegation of a "transfer of the work", and thus the work opportunities of the employees for whom the applicant has bargaining rights, other than to the extent already covered by the application as filed (i.e. the franchising through Willett Foods Limited of "Mr. Grocer" stores), and apart from the sale of certain stores to A & P (which the applicant does not challenge). Were that to change, the full "successor" and "related employer" provisions of the *Labour Relations Act*, together with its unfair labour practice provisions, would again be available to the applicant for the purpose of litigating any claims it might have.

6. There is, of course, a companion section 89 complaint in these proceedings, as there was in *Penmarkay*, [1984] OLRB Rep. Sept. 1214, although the Board in that case did not deem it necessary to comment upon it. With respect to section 89 relief, the Board made it clear in *Sunnylea Foods*, [1984] OLRB Rep. Nov. 1640, and in *Daynes Health Care Limited*, (as yet unreported) Board File No. 2053-83-U, released March 5, 1985, that, in an appropriate kind of case, and at least where the corporate entity itself has disappeared, or has explicitly threatened to do so if a full measure of damages is claimed, the Board is not unprepared to affix liability to an individual or "person" acting on behalf of the corporate employer. But again, every corporation must ultimately act through individuals, and the applicant has been unable to plead (nor, as in *Sunnylea* and *Daynes*, has prior litigation shown) a course of conduct anywhere close to the exceptional circumstances causing the Board to consider the steps it did in those latter two cases.

7. On the basis of the foregoing, the request of the applicant to expand the list of parties beyond those already encompassed by the present proceedings is denied.

7. The applications and complaint involving Termarg Food Services Limited were not then heard on the merits. Instead, applications involving the Mr. Grocer operation franchised to RPKC Holding Corporation Limited ("RPKC") were scheduled for hearing beginning in May 1985. On April 29, 1985, Local 414 filed a complaint under section 89 naming DSL, Willett and RPKC as respondents; Local 414 did not seek to add Argcen, Argus or the Blacks. Another panel heard that complaint together with the scheduled applications. Those hearings ended in February 1986. The Board's decision was released in June 1986: *RPKC Holding Corporation Limited*, [1986] OLRB Rep. June 828 ("the RPKC case").

8. Local 414 did not name Argcen, Argus or the Blacks in the 7 subsection 1(4) applications it filed in May 1985, nor in the 21 section 89 complaints it filed in July 1985. All outstanding applications and complaints by Locals 414 and 579 involving Mr. Grocer franchises, including those involving Termarg Food Services Limited, were eventually scheduled for hearing in June 1986, together with all outstanding applications by franchisees under subsection 63(5). On April 23, 1986, counsel for Locals 414 and 579 advised the Board by letter that they wished to amend the then outstanding subsection 1(4) applications and section 89 complaints to add Black and Hollinger

as respondents. The proposed respondents opposed the amendment at the opening of the June hearings before us. We adjourned consideration of the question and directed that particulars be given. They were, in 58 new subsection 1(4) applications and 58 new section 89 complaints filed in July 1986, together with 58 applications under section 63, with respect to 58 Mr. Grocer locations, including the 40 locations affected by applications and complaints which were still pending in June. All 174 new applications and complaints, together with the 110 then outstanding "old" section 89, 63, 63(5) and 1(4) matters and the 10 termination applications which had been filed under subsection 57(2) in 1984 by employees of Mr. Grocer franchisees, came before us on the August 1986 continuation dates in the "old" matters. Local 579 is the applicant/complainant in new filings involving the two aforementioned Sudbury locations, but Local 545 has been substituted for Local 579 as applicant/complainant in new filings involving the Sturgeon Falls location. Local 414 is now the applicant/complainant with respect to 52 locations, having withdrawn with respect to three locations on August 12th. Black and Hollinger maintain their objection to being added as respondents in the old subsection 1(4) applications and section 89 complaints, and ask that they be deleted as respondents in the new ones.

II

9. The trade unions plead, as Local 414 did in March 1985, that: DSL became a wholly owned subsidiary of Argcen in August 1984, and publicly held shares in DSL were exchanged for shares in Argcen shortly thereafter; the Blacks, who controlled Argcen and DSL through other corporations and held directorships and senior executive offices in those corporations and in DSL, had become more actively involved in the management of DSL; the Blacks caused the replacement of the President of DSL in December 1984; the intended sale to The Great Atlantic and Pacific Tea Company Limited ("A & P") of a number of "Dominion" stores and related assets was announced in February 1985, and there was speculation that DSL would thereafter dispose of other retail operations.

10. In addition, the unions now plead that, since mid-March 1985, the sale to A & P has closed and hundreds of DSL employees, including most of DSL's head office staff, have been laid off; DSL assets in New Brunswick and Nova Scotia have been sold; Conrad Black ("Black") has bought the shares and taken over the corporate positions formerly held by his brother Montegu (including, as counsel for the unions conceded in argument, the position of Chairman of the Board of DSL); Argcen and other corporations have amalgamated to form Hollinger Inc.; Black has initiated what Hollinger's interim financial statements describe as "the winding down and rationalization of Dominion's ongoing activities", including DSL's now well publicized attempts to recover monies from its pension fund; the President of DSL was again replaced in late February 1986; and, Black and Hollinger "are anxious to dispose of all their remaining holdings in the food business including the Mr. Grocer franchise operation carried on in Ontario through Willett" and have engaged in extensive discussions with potential purchasers since March 1985. The following paragraph of the unions' pleadings reflects the thrust of their allegations with respect to the period since the *Termarg* decision:

Since March of 1985, it has become ever more clear that Dominion and/or Domgroup Ltd. has become a shell of a company under the direction and control of the new parent corporation Hollinger, the individual respondent Mr. Black and others on their behalf, who have not previously taken an active role in grocery retailing or wholesaling.

11. Thus, since Hollinger is the legal successor of Argcen, the proposed respondents are two of the very persons whose proposed addition as respondents was considered by the *Termarg* panel in March 1985, and the proposed respondents now stand in the same relation to DSL and Willett as the two Blacks and Argcen did then. Counsel for the trade unions concedes that most of

the facts pleaded in support of their claims against Black and Hollinger either had occurred or were predicted by him when the Termarg case was argued.

12. Counsel for Black and Hollinger argue that the claims now asserted against them are the very claims that were being asserted against them in March 1985, when the Termarg panel determined in their favour the question whether the Board would entertain those claims. They say that the allegations of fact now made in support of the renewed claims against them are materially unchanged from the allegations placed before the Termarg panel. They submit that the Board should refuse to permit the relitigation of the very issues disposed of in *Termarg*, either on principles analogous to *res judicata* and issue estoppel or on the principles applied by the Board on applications for reconsideration. In any event, they say the *Termarg* decision was right and that this panel should follow it even if not bound by the aforesaid principles to do so.

13. Counsel for the unions submits that their pleadings disclose an arguable case for a single employer declaration which includes Black and Hollinger, because one object of a declaration under subsection 1(4) is “to ensure that the union representing employees is able to deal directly with the person or company possessing real economic control over them rather than with someone else who is their employer in name only”: *Penmarkay Foods Limited*, *supra*, at paragraph 40. He argues that we should not follow the *Termarg* decision because the Termarg panel did not have before it the allegations with respect to the period following March 1985 and because that decision is wrong. It is wrong, he says, because an application under subsection 1(4) should not be dismissed as against a respondent without hearing the evidence which subsection 1(5) requires a respondent to adduce. The Termarg panel was wrong and unfair, he says, to conclude from his letter that access to “deep pockets” was the only object of the application under subsection 1(4). (We note that counsel does not say the Board should not have considered the letter. He acknowledges having waived the privilege which may otherwise have attached to it as an offer to settle potential claims.) In any event, he argues, the premise of the decision, and that of the decision in *Total Marketing Incorporated*, *supra*, on which it relies, is wrong: giving access to “deep pockets” is, in his submission, a legitimate use of the discretion granted to the Board in subsection 1(4).

III

14. In the courts, a question arising between parties is *res judicata* if it has already been decided, as between those parties or their privies, by a final judgment of a court which had jurisdiction to deal with it. The previous decision creates an estoppel *per rem judicatam*. Court decisions refer to two distinct forms of estoppel: cause of action estoppel and issue estoppel. We need not explore in detail the differences between cause of action estoppel and issue estoppel, nor determine whether issue estoppel is something distinct from estoppel *per rem judicatam* (as the language of some decisions suggests) or merely one kind of estoppel *per rem judicatam*. The purposes served by the doctrines of cause of action estoppel and issue estoppel were described by Laskin, J. (as he then was) in *Angle v. Minister of National Revenue* (1974), 47 D.L.R. (3d) 544, [1975] S.C.R. 248, at pp. 550-551 (D.L.R.):

The basis of issue estoppel as well as of cause of action estoppel has been variously explained; for example, that it is “founded on considerations of justice and good sense” (see *New Brunswick R. Co. v. British and French Trust Corp. Ltd.* [1939] A.C. 1 at p. 19); that it is “founded upon the twin principles so frequently expressed in Latin that there should be an end to litigation and justice demands that the same party shall not be harassed twice for the same cause” (*Carl Zeiss case*, [1967] 1 A.C. 853, *per* Lord Upjohn at p. 946, *per* Lord Guest at p. 933); that it is founded on “the general interest of the community in the termination of disputes, and in the finality and conclusiveness of judicial decisions; and ...the right of the individual to be protected from vexatious multiplication of suits and prosecutions...” (Spencer Bower and Turner, *Res Judicata*, 2nd ed. (1969), p. 10). Although, as Lord Reid said in the *Carl Zeiss case*, at p. 913,

"issue estoppel may be a comparatively new phrase" (and is also known, especially in American decisions and writings, as collateral estoppel or issue preclusion), as a principle it goes back almost two hundred years in English case law to the *Duchess of Kingston's Case* (1776), 20 St. Tr. 355. It has been recognized as well in Canadian case law as the following statement by Middleton, J.A., in *McIntosh v. Parent* (1924), 55 O.L.R. 552 at p. 555, attests:

When a question is litigated, the judgment of the Court is a final determination between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains...

In *Town of Grandview v. Doering* (1975), 61 D.L.R. (3d) 455 (S.C.C.), Mr. Justice Ritchie cited with approval the following passage from *Phosphate Sewage Co. v. Molleson* (1879), 4 App. Cas. 801 at pp. 814-5 (per Earl Cairns L.C.):

As I understand the law with regard to *res judicata*, it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. My Lords, the only way in which that could possibly be admitted would be if the litigant were prepared to say, I will shew you that this is a fact which entirely changes the aspect of the case, and I will shew you further that it was not, and could not be reasonable diligence have been, ascertained by me before....

15. While perhaps not bound by law to apply doctrines like *res judicata* and issue estoppel, the Board has found good reason to do so, as the Board observed in *Arnold Markets Limited*, 62 CLLC 16,221:

It seems obvious that as a general rule, once a fact or question has been put in issue and directly adjudicated upon in a proceeding before the Board, such adjudication should constitute a final determination of the matter between the same parties and conclusive evidence for or against them in any other proceeding before the Board which involves the same question or fact. It is our opinion that the Board ought, as a general rule, to apply a principle analogous to that of *res judicata* or estoppel with the result that it must accept an existing decision made by it on the merits as conclusive evidence for or against the parties or their privies in any subsequent proceeding brought before it by the same parties and involving the same questions or facts decided by it in the first decision.

(See also *Canadian General Electric Company Limited*, [1978] OLRB Rep. Apr. 384 and the decisions cited therein.) Of course, neither cause of action estoppel nor issue estoppel can operate against anyone other than a person whose position or claim was asserted in the proceedings which led to the decision or someone claiming under or through that person. The dismissal of one union's claim that two employers be the subject of a single employer declaration cannot bar another trade union's claim for such a declaration with respect to the same respondent employers, for example: *Valentine Enterprises Contracting Limited*, [1981] OLRB Rep. June 807.

16. A party adversely affected by the determinative or preclusive estoppel effect of a Board decision may apply under subsection 106(1) of the Act for reconsideration of that decision. The principles usually applied by the Board in assessing requests for reconsideration have been reviewed in a number of cases. The following passage from *K-Mart Canada Limited*, [1981] OLRB Rep. Feb. 185 at paragraph 4 is illustrative:

To avoid abuse of the reconsideration provision and bring some finality to its adjudicated decisions the Board has adopted principles not unlike those of the courts. The Board will not normally acceded to a request to reconsider unless the party requesting reconsideration intends to adduce new evidence which was not previously available to them by the exercise of due diligence, and then only where such additional evidence, if proved, would be likely to make a substantial difference to the outcome of the cases. Reconsideration is therefore generally restricted to allowing a party to adduce evidence or make representations which it did not have a previous opportunity to raise. The Board may also consider such factors as the motives for the request for reconsideration in light of a party's conduct, and the resulting prejudice to another party if the case is reopened. (See, generally, *International Nickel Company of Canada*, 63 CLLC 16,284; *The Detroit River Construction Limited*, 63 CLLC 16,260; *National Steel Car Corporation Limited*, [1966] OLRB Rep. Apr. 55; *Canadian Union of General Employees*, [1975] OLRB Rep. Apr. 320; *York University*, [1976] OLRB Rep. Apr. 187 affirmed, sub. nom. *Jordan v. Ontario Labour Relations Board*, *York University Faculty Association*, *York University*, 78 CLLC 14,132, (Ont. Div. Ct.).

The Board will also reconsider a decision founded on an undisputed error of fact, a decision which is clearly wrong in law, a decision which appears inconsistent with another decision in the same proceedings, a decision made without notice to a necessary party or a decision obtained by fraud or deceit. The Board may choose to reconsider a decision if the request raises significant and important issues of Board policy (*John Entwistle Construction Ltd.*, [1979] OLRB Rep. Nov. 1096; *Clifford Masonry Ltd.*, [1982] OLRB Rep. Jan 14), but the mere fact that the Board has changed its approach to like cases since making a decision may not be sufficient reason to reconsider it (*County of Lambton*, 65 CLLC 16,057).

17. Beyond its determinative or preclusive effect in subsequent proceedings involving the immediate parties, a Board decision in one case will also ordinarily have a persuasive influence on decisions in other disputes involving similarly situated parties. Reasons why that should be so are reflected in paragraph 22 of the Board's decision in *Oakwood Park Lodge*, [1980] OLRB Rep. Oct. 1501:

22. We do not wish to leave this matter without returning briefly to the views expressed by Professor Arthurs in *Wickett and Craig* [(1963), 13 L.A.C. 363]. There, it will be recalled, he distinguished between the preclusive and persuasive effect of a previous decision; and while rejecting the former, held that a previous decision between the same parties should generally be followed unless it can be fairly distinguished or appears to be clearly wrong. This decision, of course, was made in an arbitration context, but the reliance interests and need for predictability and objectivity in decision-making are equally applicable to proceedings before the Board. Cases and decisions do not stand alone; they are part of a continuum. The Board does not face each problem as a new and pristine blackboard never previously written on. As we have already pointed out parties can, and should, reasonably expect that if a decision has been rendered in an earlier proceeding which is related logically to a later one, the former must be taken into account. Decisions in earlier cases should not be undercut promiscuously by those in later cases. Later decisions should, unless there are overriding factors to the contrary, be consistent with those in earlier cases. Only in this way can respect for the system be maintained...

IV

18. Again, Local 414 did not expressly apply for reconsideration of the *Termarg* decision. Had it done so, that application would undoubtedly have been put before the panel which made the original decision, in accordance with the Board's usual practice. Rather than apply for reconsideration *per se*, Local 414 has simply sought again to achieve what it was denied in *Termarg*, this time with respect to a larger number of applications and complaints which, however, include the very application and complaint which had been before the panel in *Termarg*. The parties all recognized at the outset that the argument of the questions dealt with here would take on the aspect of a

reconsideration request and, in the end, none opposed this panel's dealing with such a request, even though we are not the panel which made the original decision.

19. Apart from the added question whether they are the subject of a cause of action or issue estoppel, the basic issues raised by the question whether Black and Hollinger should be or remain respondents in the proceedings now before us are exactly the same as those raised by Local 414's application to add Black and Argeen as respondents in the *Termarg* proceedings. In the circumstances, we agree with the respondents that the result of the *Termarg* decision ought to be treated as determinative of the questions before us, at least with respect to those proceedings in which Local 414 is applicant/complainant, unless the allegations of fact with respect to the period since mid-March 1985 materially alter the nature of or basis for the proposed claims or there is some other appropriate reason to reconsider the *Termarg* decision itself.

20. None of the parties addressed themselves to the fact that Locals 545 and 579 were not parties involved in the *Termarg* case, and are not the successors, assigns or "privies" of Local 414 in the matters before us. However persuasive the *Termarg* decision may be in assessing their right to have Black and Hollinger as respondents in these proceedings, it does not appear that any doctrine analogous to *res judicata* or issue estoppel could fairly be applied to Locals 545 and 579 in respect of the *Termarg* decision. If it appeared that the possible difference between Local 414's position and that of Locals 545 and 579 might affect the result, we would have invited the parties' submissions on this point before coming to any firm conclusions.

21. With respect to the unions' argument that the facts here are new and different, when we compare the allegations before us with those which were put before the *Termarg* panel and consider the reasons that panel gave for their decision, it is apparent that the "new" facts are merely facts "going in exactly the same direction with the facts stated before." There is nothing new in the allegation that the proposed respondents are exercising control over DSL; the added changes in the chain of control and the identity of those in ultimate control are immaterial if the *Termarg* panel's analysis is correct. The allegations of further divestitures, of DSL's having become a "shell" and of the proposed respondents' intention to sell DSL or its remaining assets are new, but they merely amplify the unions' original concern about the ability of DSL and Willett to satisfy any money award which may be against them in these and earlier Board and related arbitration proceedings. It is quite clear that the amplitude of that concern was a matter of indifference to the *Termarg* panel, which concluded that neither actual nor anticipated inability of an employer to satisfy liabilities arising out of its collective bargaining relationship is *by itself* any reason to declare that that employer and the solvent entities which control it constitute one employer for the purpose of the Act.

22. We do not see any reason to reconsider the *Termarg* panel's acceptance of the statements of law and policy made by the Board in *Total Marketing Incorporated*. As for the panel's application of those statements to the case before it, we are unable to accept counsel's submission that it was unfair for the *Termarg* panel to conclude from his letter that Local 414's "desire to insure the results of its various legal proceedings by way of further 'deep pocket'" was the only object of Local 414's application under subsection 1(4). We are bound to observe that the letter clearly gives that impression, as it shows Local 414 is content to drop any question of including additional respondents in a single employer declaration if those respondents guarantee that the union's existing claims would be financially honoured. Furthermore, it does not appear that the panel drew that conclusion from the letter alone. The letter alerted the *Termarg* panel to the fact that this was the applicant's major (if not only) object. The panel then noted, in paragraph 5 of its decision, that there was no allegation of "transfer of work" other than that covered by the application as originally filed, and made it clear that the result would have been different if there had

been such allegations. We might add that in the particulars it filed with the Termarg panel, Local 414 had not alleged any other collective bargaining difficulty which it connected in some way with the control of DSL by the persons it sought to add as respondents. The Termarg panel's focus on whether such difficulties had been pleaded is not inconsistent with the proposition that one object of a declaration under subsection 1(4) is "to ensure that the union representing employees is able to deal directly with the person or company possessing real economic control over them rather than with someone else who is their employer in name only." That statement of the proposition should not be taken out of context, and the significance of its last seven words should not be minimized.

23. Many employers are corporations. Many corporations are under the ultimate control of one person. Such circumstances do not attract a declaration that the corporation and its directors or controlling shareholders are one employer for the purpose of the *Labour Relations Act*, in the absence of some labour relations problem involving a transfer of work or some other difficulty with the exercise or definition of bargaining rights. Putting it another way, a corporate employer is not "an employer in name only" in the sense intended by the quoted phrase by reason only of its being closely held or having a small number of executive decision makers or having a modest or diminishing net worth. It should not be overlooked that statements of the sort quoted are made in cases in which the nominal employer is heavily dependent on one sole or dominant supplier or customer or revenue source (generally, but not necessarily, an employer or former employer of persons represented by the applicant trade union who do or did work like that now undertaken by the nominal employer) whose dictates, enforced through the exercise of its economic power, make it a ghost at the bargaining table.

24. In *Carroll Electric (1982) Limited*, [1983] OLRB Rep. August 1275, the potential inability of one respondent to satisfy collective agreement liabilities was one of the considerations which led the Board to grant a single employer declaration. In that case, the Board found a scheme by an employer to defeat the bargaining rights of the union which represented its employees by transferring its business to a shell company over which it exercised significant control, with the result that, but for a declaration under subsection 1(4), the assets of the former would be isolated from the liability consequences of the intended wholesale refusal by the interposed shell company to recognize the union's bargaining rights or abide by the terms of the applicable collective agreement. It was this unfair labour practice element, among other features, on which the Board in *Carroll Electric* distinguished the decision in *Total Marketing Incorporated*, *supra*. In this case, however, the trade unions do not plead, and in argument expressly declined to allege, that DSL's alleged "shell" condition is the result of any attempt by the proposed respondents to remove assets from exposure to the unions' claims under their collective agreements or the Act or to frustrate collective bargaining or is otherwise the result of an unfair labour practice.

25. An applicant trade union is not entitled as of right to a declaration under subsection 1(4) when it is established that respondents carry on associated or related businesses under common control or direction. Those conditions are merely the prerequisites to the exercise by the Board of a discretion to grant or withhold a single employer declaration. The Board will be guided in the exercise of that discretion by its understanding of the labour relations purpose of the subsection. Subsection 1(5) casts on respondents an obligation to adduce all facts within their knowledge that are material to the allegation that they are or were under common control or direction. We agree with counsel for the unions that the adequacy of an applicant's pleading of *that* allegation should not ordinarily be the basis of a decision to dismiss before hearing the respondents' evidence: *Guaranteed Insulation '77 Limited*, [1981] OLRB Rep. Oct. 1394. It does not follow, however, that there are no circumstances in which the Board could dismiss a subsection 1(4) application before hearing the respondents' evidence.

26. Before hearing any evidence in a proceeding before it, the Board may (but is not obliged to) invite an applicant or complainant to state or set out in writing all of the material facts on which it relies in asking for the relief claimed, not just those facts which it may be obliged by a prescribed form, or by section 72 of the Board's Rules of Procedure, to particularize. Counsel for the unions concedes that the Board can do that in proceedings involving the application of subsection 1(4). When it does so, it may consider whether, assuming the truth of the facts alleged, including the allegation that the respondents are or were at all material times carrying on associated or related activities or businesses under common control or direction, it would exercise its discretion under subsection 1(4) in the applicant's favour. That is the sort of inquiry on which the Termarg panel embarked with respect to the proposed addition of respondents to the subsection 1(4) application. We see nothing improper in its having done so, nor any reason to reconsider the result at which it arrived.

27. We engaged in the same sort of inquiry with respect to the questions considered here. At several points, we invited counsel for the unions to amplify what appeared in the documents filed, by asking questions in the form "Do you allege that ...?" Counsel's answers were often in the form "We have no evidence that ...". It is important to note here, as we did then, that when engaging in this sort of inquiry the Board's focus is not on what evidence the applicant may have or the likelihood that it can prove what it alleges, but merely on what the applicant chooses to allege. We do not denigrate in any way counsel's statement that he considers it would be irresponsible of him or his clients to make allegations, particularly allegations of wrong-doing, which he has no expectation of proving. The fact remains that the purpose of hearing evidence is to determine whether contested allegations of fact are true. There is no reason to hear evidence if the only allegations an applicant makes would not, if proven or admitted, lead the Board to grant it the relief it seeks.

28. We are satisfied that the Termarg panel's decision that the Blacks and Argcen not be added as respondents to Local 414's subsection 1(4) application should not be disturbed on reconsideration. We are also satisfied that that decision should now preclude Local 414 from adding Black and Hollinger as respondents in the subsection 1(4) applications before us on the facts it has alleged. Even if that decision were not preclusive for Local 414, we are satisfied that if all its allegations were proven true we would not exercise our discretion to include Black or Hollinger in any single employer declaration which might otherwise result in these matters. As Locals 545 and 579 rely on the same allegations in support of similar claims, we have come to the same conclusion with respect to their section 1(4) applications. Accordingly, the request of Locals 414 and 579 to add Black and Hollinger as respondents in the "old" subsection 1(4) applications is denied, and the "new" subsection 1(4) applications of all three unions are dismissed as against Black and Hollinger.

V

29. The argument of the questions addressed here proceeded on the implicit assumption that the unions have pleaded a *prima facie* unfair labour practice case against at least some of the entities it asks the Board to include in a single employer declaration. Had we concluded that Black and Hollinger were proper respondents to the unions' applications for a single employer declaration, we would have concluded that they were proper respondents to their section 89 complaints as well. That is because it can be argued that entities declared to be a single employer for the purposes of the Act are jointly and severally liable for breaches of the Act committed by any one of them during the period for which the declaration is effective. Because we have concluded that neither Black nor Hollinger is a proper respondent to the subsection 1(4) applications, we must consider whether they are nevertheless proper respondents to the unions' section 89 complaints.

30. In the complaints before us, the complainant trade unions do not allege that either of the proposed respondents has planned, ordered or participated in any behaviour now alleged to constitute an unfair labour practice. The only basis on which the unions suggest that either Black or Hollinger could remain proper respondents to the section 89 complaint if they are not also respondents to the subsection 1(4) application is the theory that those who actively control a corporate employer are personally liable for the wrongdoing of anyone acting on behalf of that employer even if they have not personally planned, ordered, committed or otherwise participated in that wrongdoing. In other words, counsel for the union argues that those who actively control a corporate entity have a vicarious liability which is as broad as that of the employer itself. The sections which the unions say have been breached are sections 50, 64, 66 and 67. Nothing in the language of these sections supports the unions' proposed extension of vicarious liability to directors and controlling shareholders. While the language of sections 64 and 66 exposes persons "acting on behalf of an employer" to liability for their own personal behaviour and its consequences, that does not put such persons in the same position as employers with respect to the acts of other employees or agents of the employer. The unions have not alleged a *prima facie* case against either Black or Hollinger under section 89 of the Act. Therefore, the applications of Local 414 and 579 to add Black and Hollinger as respondents to the "old" section 89 complaints is denied, and the three unions' "new" section 89 complaints are dismissed as against them both.

31. From the material filed in the *Termarg* case, it appears that this vicarious liability theory was the only basis on which Local 414 argued that the proposed respondents there were proper respondents to its section 89 complaint independent of any exposure created by its subsection 1(4) application. The breaches of the Act alleged there were broader than those alleged here. At that point, Local 414 took the position that the decision to close DSL's stores and the decision to embark on the franchise program through Willett both constituted violations of the Act, whereas at this point, the unions accept the finding in the *RPKC* case that those decisions did not violate the Act. Even in that context, however, Local 414 was not alleging direct participation in unfair labour practices by the then proposed respondents. With respect to the section 89 complaint, the particulars filed with the *Termarg* panel said only this:

We wish, in fairness, to make clear our position with respect to the Section 89 Complaint. We have no direct knowledge of any misconduct specifically attributable to those parties which it sought to add. The Complaint as drawn, alleges in effect, *inter alia* that the decision to embark upon the franchising scheme and, *a fortiori*, the decision to persist in it violated the pleaded sections of the *Labour Relations Act*. It is our position that, in the circumstances of such a basic corporate decision which is alleged to be unlawful, the appropriate respondents include those who exercise direction and control of that organization.

This is the claim to which the *Termarg* panel was responding in paragraph 6 of its decision. Read in isolation from that context, that paragraph might be taken to imply that the Board will not grant any remedy against a respondent whose behaviour otherwise contravenes the Act if that respondent is "an individual or 'person' acting on behalf of [a] corporate employer" unless "the corporate entity itself has disappeared, or has explicitly threatened to do so if a full measure of damages is claimed" or the respondent has engaged in "a course of conduct anywhere close to the exceptional circumstances causing the Board to consider" granting a remedy against the individual respondents in *Sunnylea Foods*, [1981] OLRB Rep. Nov. 1640. As it was not alleged before the *Termarg* panel that the proposed respondents or any of them had themselves planned, ordered or participated in behaviour alleged to constitute an unfair labour practice, any suggestion that the proposed respondents might not have been proper respondents even if such allegations *had* been made would have been *obiter dicta*. Even if, in its context, the language of paragraph 6 of the *Termarg* decision represents anything more than a rejection of the theory of vicarious liability advanced by Local 414, faithfulness to principles analogous to doctrines of cause of action estoppel and issue estoppel

would not have *required* us to conform to views expressed in *obiter dicta*. In any event, our decision in this case does not rest on any notion that there are circumstances in which the Board will decline to inquire into a section 89 complaint against a respondent merely because that respondent is an individual or because that respondent is an officer or shareholder of a corporate employer. In both this and the *Termarg* case, it has been unnecessary to decide whether there are any such circumstances.

32. In the result, neither Black nor Hollinger shall be or remain a respondent in, and their names shall hereafter be deleted from the titles of, these proceedings.

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[Schedules "A" to "C" omitted: Editor]

2866-85-R; 2867-85-R; 2868-85-R; 3067-85-R; 0882-86-R United Food and Commercial Workers International Union, Local 175 and 633, Applicant, v. **New Dominion Stores Inc.**, The Great Atlantic & Pacific Company of Canada Limited, Respondents, v. Retail, Wholesale & Department Store Union, Local 528, Intervener; United Food and Commercial Workers International Union, Locals 175 and 633, Applicant, v. **New Dominion Stores Inc.**, The Great Atlantic & Pacific Company of Canada Limited, Respondents, v. Retail, Wholesale & Department Store Union, Local 414 AFL-CIO-CLC, Intervener; United Food and Commercial Workers International Union, Locals 175 and 633, Applicant, v. **New Dominion Stores Inc.**, The Great Atlantic & Pacific Company of Canada Limited, Respondents, v. Retail, Wholesale & Department Store Union, Local 414, AFL-CIO-CLC, Intervener; United Food and Commercial Workers International Union, Locals 175 and 633, Applicant, v. **New Dominion Stores Inc.**, The Great Atlantic & Pacific Company of Canada Limited, Respondents, v. Retail, Wholesale & Department Store Union, Local 414, Intervener; United Food and Commercial Workers International Union, Locals 175 and 633, Applicant, v. **New Dominion Stores Inc.**, The Great Atlantic & Pacific Company of Canada Limited, Respondents, v. Retail, Wholesale & Department Store Union, Local 414, Intervener

Sale of a Business - New Dominion stores converted to A & P stores - Whether prior decision that scope clauses be restricted to street addresses should be followed - Whether purpose of s.63 to preserve existing rights from possible future transactions

BEFORE: S. A. Tacon, Vice-Chairman, and Board Members G. O. Shamanski and B. L. Armstrong.

APPEARANCES: Harold F. Caley and Wayne Hanley for the applicant; David Churchill-Smith, Charles R. Robertson and Tom Zakrzewski for the respondents; James Hayes, D. G. Collins, Leo J. Grandbois and Robin W. McArthur for the intervener.

DECISION OF THE BOARD; October 30, 1986

1. The above applications are brought under section 63 of the *Labour Relations Act* by the United Food and Commercial Workers International Union, Locals 175 and 633. With respect to Board File 2866-85-R, the Retail, Wholesale & Department Store Union, Local 528, and, with respect to the remaining four applications, the Retail, Wholesale & Department Store Union, Local 414 are added to these proceedings as interveners. The parties agreed that these matters shall be heard together. For convenience, the applicant is referred to as the UFCW and the interveners collectively as the RWDSU unless reference to the specific local is also necessary.

2. The parties further agree that, for the purposes of these applications, the Board could transpose the findings of fact in a decision of the Board, differently constituted, in *New Dominion Stores Inc.*, [1986] OLRB Rep. Apr. 519 (hereinafter referred to as the MacDowell decision) to the instant circumstances. In that case, the applicants and respondents were identical to those parties in the instant applications. Intervener #1 was the UFCW Local 206 and intervener #2, which was refused standing in an oral ruling, was the United Steelworkers of America. The MacDowell decision dealt with a former “New Dominion Store” in Chatham for which the UFCW Local 206 held bargaining rights which was “converted” to an A & P store, thereby creating a conflict with the UFCW Locals 175 and 633 which held province-wide bargaining rights for A & P stores.

3. While it is necessary to refer to the MacDowell decision in more detail, it is appropriate at this juncture to note that the decision amended the scope clause of the UFCW Local 175 and 633 collective agreement to exclude the Chatham store by reference to its street address and, further, restricted the UFCW Local 206 scope clause to that street address. Also at issue in the MacDowell decision was a question of intermingling. The Board did not find intermingling had occurred within the meaning of the Act and, consequently, the excerpts from the MacDowell decision do not include references to that issue as a matter of fact or law.

4. The Board next sets out the following passages from the MacDowell decision.

7. For many years the applicants, UFCW Local 175 and 633, have represented the employees working in A & P's retail food stores across Ontario. For many years there has been a province-wide, multi-store collective agreement regulating the terms and conditions of employment for those employees. The agreement currently covers approximately 105 stores and 9,000 employees: 3,000 to 4,000 full-time employees, and 5,000 to 6,000 part-time employees. The relevant portions of the “recognition clauses” are as follows:

1.01 The Company recognizes Local Union 175 as the exclusive bargaining agent for *all employees* of the Company in its Retail Stores located in the Province of Ontario, save and except Assistant Store Managers, persons above the rank of Assistant Store Manager, Meat Department employees, persons regularly employed for not more than twenty-four (24) hours per week and students employed in off school hours and during the school vacation period.

1.02 The Company recognizes Local Union 633 as the exclusive bargaining agent for *all Meat Department employees* of the Company in its Retail Stores located in the Province of Ontario, save and except persons regularly employed for not more than twenty-four (24) hours per week and students employed in off school hours and during the school vacation period.

1.03 The term “employee” or “employees” as used in this Agreement, unless clearly specified otherwise shall mean only those employees who are included in the bargaining unit, as described in Sections 1.01 and 1.02 above.

PART TIME

1.01 The Company recognizes the Union as the exclusive collective bargaining agent for *all employees* of the Company in its Retail Stores located in the Province of Ontario.

io, *regularly employed for not more than twenty-four (24) hours per week* and students employed during off school hours and during the school vacation period.

1.02 The term "employee" or "employees" as used in this Agreement, unless clearly specified otherwise shall mean only those employees who are included in the bargaining unit, as described in Section 1.01 above.

[emphasis added]

All of A & P's retail employees fall into one of these three employee groupings: "full-time", "part-time", "meat department".

8. In the spring of 1985, A & P purchased some 92 retail food stores from Dominion Stores Limited ("Dominion"). That transaction closed on or about April 29, 1985. The details are not relevant here, save to note that Dominion did not dispose of all of its retail food stores. There are approximately 30 stores still owned by Dominion; however, after April 29, 1986, that company will no longer be entitled to use the name "Dominion". We do not know precisely what will happen to those stores, but it is clear that they will not be operated or described as "Dominion" stores.

9. For commercial reasons, A & P initially intended to maintain the separate identity and operation of the 92 stores it had acquired from Dominion. To accomplish this purpose, A & P incorporated a wholly-owned subsidiary named New Dominion Stores Inc. A & P and New Dominion shared an integrated warehousing facility, but the store operations themselves were kept separate. The employees who formerly worked for Dominion became employees of New Dominion, which paid their wages and otherwise assumed the responsibilities of employer. There was no immediate impact on the bargaining rights of the applicants or the employees they represent. Pursuant to section 63 of the *Labour Relations Act*, New Dominion, as a successor employer, assumed any outstanding collective bargaining obligations which Dominion may have had with its employees, including those in the Chatham store. In the Chatham store, the employees are represented by Local 206 which has entered into a collective agreement with New Dominion which is to expire in September 1986. The recognition clause of that collective agreement reads as follows:

1.01 The Union shall be the sole and exclusive bargaining agent for all employees of New Dominion Stores, Inc. at its retail stores in Chatham and Wallaceburg, and the townships of Dover and Chatham, Ontario, save and except Store Managers, persons above the rank of Store Manager, Assistant Store Manager.

1.02 The wages, working conditions and all other matters relative to persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school summer vacation period shall be only as outlined in Appendix "B".

10. Although A & P decided initially not to integrate the "Dominion" stores into its existing chain of retail foods stores, there are some recognition that these stores had become part of the A & P corporate family. The integrated warehouse facility is one example, but there were others at the local level.

...

12. On Saturday, January 25, 1986, the Chatham New Dominion store closed as usual at 9:30 p.m. The following day all "Dominion" signs and logos were removed from the premises and equipment, and A & P signs or logos put in their place. From Monday, January 27th to Wednesday, January 30th, products with the Dominion label were removed from the shelves and replaced by A & P private label stock. This task was accomplished by the local staff, with the assistance of managers and assistant managers from A & P stores in Windsor and Wallaceburg. The Chatham New Dominion store which was previously identified for corporate purposes as New Dominion store number 980, became A & P store number 362. For all intents and purposes, it is now the same as any other A & P store. The A & P assistant store manager who came over in May 1985 to assist in the transition to New Dominion has returned as the manager of what has now become the second A & P store in Chatham.

13. Since and end of January 1986, other New Dominion food stores have been converted into A & P stores - although there are a number of stores which are still being run by A & P as "Dominion" stores. Labour relations policies are controlled centrally by A & P, but New Dominion stores continue to have different pricing, advertising and marketing policies. However, those New Dominion locations recently converted to A & P stores are indistinguishable from the A & P stores covered by the applicants' collective agreement. The employees in Chatham will be paid by A & P, which will undertake all employer responsibilities with respect to unemployment insurance, income tax deductions, Workers' compensation, etc. Indeed, counsel for the respondents advised the Board that, as of February 23, 1986, New Dominion will no longer exist as an independent corporate entity, but will become the "New Dominion Stores Division" of A & P. Counsel for the respondents was not sure of the precise details or time table for winding up the affairs of New Dominion Stores, Inc., nor was he sure whether there would be any formal transfer to A & P of assets nominally owned by New Dominion. He submitted that, as a practical matter, formal legal ownership really does not matter very much because New Dominion was, in any event, a wholly-owned subsidiary of A & P, and thus, subject to its total control. In the case of the Chatham store, A & P has, in fact, assumed total control over the assets, stock-in-trade, equipment and business formerly operated at that location by New Dominion, and has directed the various renovations and changes mentioned above. As counsel for the respondents pointed out, since this business re-organization was "all in the family", the precise legal details are not particularly relevant - at least for labour relations purposes. For example, in the case of the employees working at the Chatham New Dominion store, it is apparent that A & P has, de facto, become their employer.

5. With respect to the legal issues, apart from the intermingling aspect which is not here relevant, the MacDowell decision concluded as follows:

18. We have no difficulty in concluding that there has been a transfer to A & P of at least part of the business of New Dominion - namely, the Chatham store. Indeed, it would appear that the corporate re-organization described by the respondents will ultimately result in A & P becoming the employer of all of the individuals now working in the New Dominion stores even if those stores continue to operate under the "Dominion" logo. We find that there has, therefore, been a "transfer" of a "business" or "part of a business" from New Dominion to A & P and that pursuant to section 63 of the Act A & P is the successor to New Dominion in respect of the collective bargaining obligations formerly existing between Local 206 and New Dominion....

22. ... it is necessary for the Board to exercise its authority under section 63(4) of the Act to define the like bargaining unit and resolve the apparent conflict between the two collective agreements to which A & P has become bound by virtue of section 63(2) of the Act. In our view, the most sensible way of doing so is to amend the provincial collective agreement so as to preclude its application to the former New Dominion store where Local 206 has bargaining rights, and to amend the current Local 206 agreement to make it clear that it does not apply to the other stores that exist or may be opened in the Chatham-Wallaceburg area. Our intention is to preserve but also confine the rights of Local 206 to the store where it had bargaining rights prior to the transaction under review.

6. It is now necessary to specify in somewhat greater detail the "conversions" which gave rise to these applications. In Board File 2866-85-R, three former "New Dominion" stores located in Sault Ste. Marie on Churchill Boulevard, Northern Avenue and Bay Street became "A & P" stores and a further New Dominion store closed. There are apparently three other A & P stores in Sault Ste. Marie which we may term "traditional" A & P stores, i.e., which were not former New Dominion stores. Board File 2867-85-R concerns two converted stores at 1147 Barton Street and 967 Fennell Avenue in Hamilton where there are also four traditional A & P stores including ones at 2500 Barton and 952 Fennell and one in nearby Dundas. As well, one New Dominion store continues to operate under that name in Dundas. Board File 2868-85-R deals with two converted stores in London, on Huron Street and Wonderland Road; five traditional A & P stores also operate in London and one other New Dominion store has been closed. In Board File 3067-85-R, three former New Dominion stores became A & P stores (Geneva Street in St. Catharines, Chemong Road in Peterborough and Midtown Drive in Oshawa). Traditional A & P stores in those areas

consist of: four in St. Catharines, two in Peterborough and two in Oshawa. It should also be noted that one "old" Dominion store was not purchased by A & P in the initial sale and continues to operate in St. Catharines although the vendor is no longer able to use the name "Dominion", and one "old" Dominion store was not purchased and later closed in Peterborough. Finally, Board File 0882-86-R concerns three converted stores in Brampton (on Vodden, Main Street and Sandalwood Parkway) where two other traditional A & P stores operate as well.

7. In the Board's view, this detail places the issue of the conversions in the necessary context of A & P's entire operations in the various locales. As is apparent from the examples in Hamilton, the "converted" A & P stores may well be in relatively close proximity to traditional A & P store locations.

8. Counsel for the applicants urged the Board to follow the MacDowell decision to both amend the UFCW province-wide scope clause to exclude the specific "conversions" and also to restrict the RWDSU scope clauses to the street addresses in those municipalities where conversions have occurred. Counsel submitted that the UFCW was not challenging the bargaining rights of the interveners at the "converted" stores themselves. However, counsel contended that the UFCW was entitled to retain its province-wide bargaining rights with only the minimal incursions necessitated by section 63 and that the interveners must "fit into" the existing and otherwise geographically unlimited bargaining rights held by the applicants. Essentially, counsel argued that the RWDSU should bear the risk of uncertainty in the future rather than the UFCW which had a *prima facie* right to represent bargaining unit employees at all A & P stores. That is, should A & P decide to open a new store under the "New Dominion stores" division or should a "converted" store move elsewhere in the municipality, for example, the UFCW should be entitled to represent those employees, otherwise the interveners would be gaining rather than merely preserving their bargaining rights existing at the time of the conversion. For the Board not to restrict the interveners' scope clauses to street addresses, it was asserted, would continue, rather than resolve, the conflicts between the collective agreements of the UFCW and RWDSU. Moreover, counsel stressed that, given the conversions might well result in closure of traditional A & P stores in close geographic proximity, to the detriment of the UFCW bargaining unit members and notwithstanding the pre-eminent bargaining rights of the UFCW in the A & P organization. In support, counsel referred to the following cases: *Loblaw Groceries Co. Limited*, [1973] OLRB Rep. Jan. 72; *Simcoe Block (1979) Limited*, [1982] OLRB Rep. Jan 118; *Pinecrest Products Limited*, [1972] OLRB Rep. Nov. 973; *Hotel Dieu of Kingston*, [1984] OLRB Rep. June 816; *The Oshawa Wholesale Limited*, [1965] OLRB Rep. Feb. 589. Finally, counsel emphasized that, in addition to the MacDowell decision, similar "conversions" have been dealt with by agreement of the parties therein in Board File No. 2869-85-R and Board File No. 0217-86-R. In the former instance, the scope clause of the intervener United Steelworkers of America was restricted to the relevant street address in Sarnia, notwithstanding that the intervener apparently held bargaining rights in Sarnia and Lambton County. In the latter application, although a Board decision has not as yet issued, the parties agreed to restrict the scope clause of the intervener United Steelworkers of America, Locals 14045 and 14974 to three street addresses in Windsor, although the intervener's bargaining rights were apparently municipal-wide. In summary, counsel submitted the Board should follow the MacDowell decision and the ensuing "pattern" represented in the Board files just noted.

9. Counsel for the respondent indicated that the respondent was prepared to follow the MacDowell decision, where the matter was fully argued, in the instant case and concurred that the MacDowell result had been adopted on agreement in two other instances. Counsel informed the Board that A & P now operates New Dominion Stores Inc. as a division within the corporation as distinct from what may be termed the "A & P" division. As a general principle, counsel agreed with counsel for the interveners that the Board should not anticipate future events.

10. Counsel for the interveners submitted that the “second” conclusion of the MacDowell decision, that the interveners’ scope clauses should be restricted to street addresses, should not be followed. It was stressed that the scope clause of Local 414, while couched in “municipal-wide” terminology, was tantamount to a province-wide agreement. Counsel did acknowledge that Local 528 in Sault Ste. Marie did more closely approximate the circumstances in the MacDowell decision dealing with Chatham but, again, submitted the intervener should not be restricted to street addresses. Counsel contended that New Dominion Stores Inc. was a large operation capable of continuing as a separate entity within the corporate structure without intermingling. What the interveners wished to preserve were their existing broad bargaining rights. Given the rapidly changing nature of the retail food industry, counsel argued the Board should neither anticipate future conflicts between the bargaining rights of the applicants and the interveners nor should the Board seek to resolve that potential conflict in the absence of a specific factual context. To restrict the interveners’ clauses to street addresses, it was asserted, would actually precipitate an erosion of those rights should specific street addresses change and/or should additional stores be opened by New Dominion Stores division. Counsel submitted that the Board need not go beyond amending the UFCW scope clause to resolve the existing conflicts created by the “conversions” and, to do more, would serve to “extend” the UFCW’s bargaining rights. That is, the resolution proposed by the interveners’ counsel would maintain the status quo, protecting the applicants without harming the interveners and without prejudice to the company. Counsel distinguished those cases referred to by counsel for the applicants on the ground that the “transferred” units were not broad based, that is, virtually province-wide. With reference to the MacDowell decision, counsel noted that the applicant and intervener therein were both locals of the UFCW and, further, his representations might well not have been made in that case.

11. The relevant sections of the Act read:

63.-(1) In this section,

- (a) “business” includes a part or parts thereof;
- (b) “sells” includes leases, transfers and any other manner of disposition, and “sold” and “sale” have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employee sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

• • •

(4) Where a business was sold to a person and a trade union or council of trade unions was the bargaining agent of any of the employees in such business or a trade union or council of trade unions is the bargaining agent of the employees in any business carried on by the person to whom the business was sold, and,

- (a) any question arises as to what constitutes the like bargaining unit referred to in subsection (3); or
- (b) any person, trade union or council or trade unions claims that, by virtue of the operation of subsection (2) or (3), a conflict exists between the bargaining rights of the trade union or council of trade unions that represented the employees of the predecessor employer and the trade union or council of

trade unions that represents the employees of the person to whom the business was sold,

the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (c) define the composition of the like bargaining unit referred to in subsection (3) with such modification, if any, as the Board considers necessary; and
- (d) amend, to such extent as the Board considers necessary, any bargaining unit in any certificate issued to any trade union or any bargaining unit defined in any collective agreement.

12. The parties did not dispute, and the Board so finds, that what occurred in the instant applications, as in Chatham, constituted a transfer of a business or part of a business within the meaning of section 63 of the Act and, therefore, that A & P is the successor employer in respect of the collective bargaining obligations formerly extant between the interveners and New Dominion Stores Inc. Moreover, there was no disagreement, and the Board so directs, that the recognition clause of the UFCW collective agreement must be amended to exclude those “converted” stores through reference to street addresses as, otherwise, there is an apparent conflict between the collective agreements of the UFCW, Locals 175 and 633, and of the RWDSU Local 414 or 528.

13. What is vigorously disputed by the interveners, however, is the further direction in the MacDowell decision that the scope clause of the intervener be correspondingly restricted to the relevant street addresses. There was no suggestion that the Board was bound by the MacDowell decision as a matter of *stare decisis* or *res judicata* nor is it apparent that the interveners’ arguments in the instant case were made before that panel. On the other hand, the Board should not lightly reach a different conclusion given that the MacDowell decision was followed in two subsequent instances on agreement of the parties therein. While the intervener in the MacDowell decision was another local of the same International, the UFCW, that was not the case in the other two instances wherein the USWA held the bargaining rights in the stores affected. And, all the applications arise in the same factual context, namely, the “conversion” of a number of New Dominion Stores to A & P stores. On the other hand, the bargaining rights of the former Dominion empire, and subsequently New Dominion Stores Inc., were held by the intervener Local 414 across the province with relatively few exceptions, one of those exceptions being a sister RWDSU Local 528. Counsel for the interveners points to the considerable reach of the RWDSU’s bargaining rights in urging that a decision or pattern dealing with the “exceptions” are not analogous.

14. By virtue of section 63(4) of the Act, the Board has a discretion to define the “like” bargaining unit and amend whatever other bargaining unit definition considered necessary to resolve the conflict between bargaining rights created by the operation of section 63. To state the issue so simply, however, belies the complex nature of the problem. As is evident from the eloquent and thoughtful submissions of counsel, sound arguments may be marshalled in support of both positions.

15. Section 63 of the Act is conservative, its intent is to *preserve* existing bargaining rights from the exigencies of commercial transactions, to provide some stability to those bargaining rights. But the concept of “preservation” contrasts both with “expansion” and “diminution”. That the Board has not permitted section 63 to serve as a vehicle for expanding bargaining rights was not disputed. Conversely, however, the Board should not interpret section 63 so as to *restrict* bargaining rights beyond the minimum needed to resolve the conflict in bargaining rights created by the operation of section 63 itself. In making this determination, the Board has regard to the scope of the bargaining rights of the bargaining agents prior to the commercial transaction involved, the

nature and scope of the commercial transaction itself and other relevant circumstances. This minimalist approach also implies that the Board should do no more than resolve existing conflicts. Obviously, the resolution, of itself, must not generate further conflicts in bargaining rights. However, neither should the Board anticipate future conflict or seek to resolve potential conflict apart from a specific factual context. In short, the Board must have regard to the circumstances of each case in the context of a conservative resolution of the matters with which section 63(4) of the Act is concerned.

16. In the instant case, the “converted” stores constitute a small proportion of the stores covered by the UFCW province-wide collective agreement with A & P and by the RWDSU, Local 414, collective agreement with New Dominion Stores, now operated as a separate division of the corporate parent. The RWDSU Local 414 bargaining rights are certainly “broadly based” whether described as “extended municipality” or “virtually province-wide”. While the RWDSU Local 528 holds bargaining rights much more limited in geographic scope, the Board is not persuaded that a different approach should be adopted in the circumstances. The Board does not consider it advisable or necessary to speculate upon the future given the pace of change in the retail food industry and in this corporation in particular. Should events generate further conflict in the bargaining rights of the applicants and interveners, those may be the subject of further proceedings to be determined in their own factual context. The Board should not prejudice the position of either at this juncture. Thus, the Board is not prepared to restrict the scope clause of the RWDSU, Local 414, or Local 528 collective agreements with New Dominion Stores to the street addresses of the “converted” stores. However, in the Board’s view, it is necessary to add a clarity note to those scope clauses to preserve bargaining rights at those converted stores.

17. For the foregoing reasons, then, the Board:

- (a) finds that the store “conversions” in the instant applications constitute a transfer of part of a business within the meaning of section 63 of the Act;
- (b) directs that the scope clause of the A & P provincial collective agreements be amended to exclude those converted stores by reference to their street addresses;
- (c) directs that a clarity note be added to the scope clauses of the New Dominion Stores collective agreement with Local 414 and with Local 528 confirming that the bargaining unit includes those stores formerly operated as New Dominion Stores and currently operated by the A & P division of the corporate parent at the various locations described by reference to their street addresses.

18. The Board directs that the parties meet to resolve the precise wording to give effect to the Board’s decision. Should the parties be unable to so agree, the Board remains seized.

1516-86-M Ontario Sheet Metal Workers Conference, Applicant, v. Ontario Hydro and Electrical Power Systems Construction Association, Respondents

Construction Industry Grievance - Jurisdictional Dispute - Whether jurisdiction of Board under s.124 ousted if issue concerns jurisdictional dispute

BEFORE: *Judith McCormack*, Vice-Chairman, and Board Members *F. W. Murray* and *C. A. Balentine*.

APPEARANCES: *B. D. Wahl*, *Geo. Ward* and *Robert Brown* for the applicant; *H. A. Beresford*, *I. A. Starasts*, *T. F. Williams*, *T. D. McKee* and *S. D. Goldsworthy* for the respondents; *A. J. Ahee* and *N. W. Meikle* for the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 527.

DECISION OF THE BOARD; October 29, 1986

1. This is a referral of a grievance to arbitration pursuant to section 124 of the *Labour Relations Act*. The applicant contends that the assignment of certain aspects of the construction of an emergency filtered air discharge system at the respondent Ontario Hydro's Bruce Nuclear Power Development to the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 527 ("United Association") constitutes a breach of the collective agreement between the applicant and the respondents. The applicant gave notice of these proceedings to the United Association who appeared at the hearing. Without deciding the issue of the United Association's standing generally in this matter, the Board allowed the United Association to make submissions on a preliminary matter raised by the respondents.

2. At the commencement of the hearing, the respondents raised an objection to the jurisdiction of the Board, namely that the subject of the grievance was in essence a jurisdictional dispute. The effect of this, it was contended, was to deprive the Board of jurisdiction to hear the grievance under section 124, and consequently the current proceedings should be terminated. The United Association took a similar position, and in the alternative, argued that the section 124 referral should be adjourned in deference to the dispute resolution mechanism for work assignments contained in the collective agreement between the applicant and the respondents. (We use the broad term "dispute resolution mechanism" because the nature of those provisions is also contested.)

3. In response, the applicant argued among other things that the Board had jurisdiction under section 124 because the grievance alleged a violation of the collective agreement, and that the dispute resolution mechanism contained in the collective agreement either did not have to be utilized or had already been exhausted for a variety of reasons. Neither party nor the United Association have filed or intend to file a complaint under section 91 of the *Labour Relations Act* which provides for the resolution of jurisdictional disputes. There was an exchange of correspondence between the Plan for the Settlement of Jurisdictional Disputes, the parties and the United Association although the character and impact of this exchange is in dispute.

4. In the course of the submissions on this preliminary issue, it became apparent that at least the applicant and the United Association were relying to a significant extent upon facts which were contested. However, the respondents objected to the hearing of evidence on the disputed

facts on the basis that they were irrelevant. By the time the parties and the United Association had addressed the question of relevancy, it was late in the day and the Board reserved its decision on the evidentiary point. We trust that this interim ruling will be of some assistance to the parties in reviewing their positions on the preliminary objection as well.

5. The essence of the respondents' evidentiary objection is that because the substance of the grievance relates to a jurisdictional dispute, the jurisdiction of the Board under section 124 is ousted. As a result, it is irrelevant whether the problem can be or should be resolved by either an application under section 91 or by a reference to the dispute resolution mechanism provided in the collective agreement. Therefore, counsel argued, it is not necessary to hear evidence on the facts in dispute which relate largely to the arguments of the applicant and the United Association with respect to the dispute resolution mechanism in the collective agreement.

6. The purpose of section 124 is to provide a speedy and economical route for the resolution of grievances in a sector where the fluid nature of work and the structure of labour relations renders more typical arbitration provisions ineffectual. (See *The Lummus Company of Canada Ltd.*, [1976] OLRB Rep. Jan. 980.) At the time this section was incorporated into the Act, it was not uncommon for grievances to be settled by work stoppages rather than arbitration. (See, *H. Waisberg J. Report of the Royal Commission of Certain Sectors of the Building Industry*, Queens Printer, Toronto, 1974 p. 340, *H. Carl Goldenberg, Report of the Royal Commission on Labour Management Relations in the Construction Industry*, Ontario, 1962 pp. 41-44.)

7. As a result it is not surprising that section 124 is drafted in a manner which emphasizes accessibility:

124.-(1) Notwithstanding the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 44, a party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, to the Board for final and binding determination.

...

8. On its face the grievance in this matter raises an issue concerning the interpretation, application, administration or alleged violation of the collective agreement. Assuming, without finding that such an issue is also in essence a jurisdictional dispute, does this oust the jurisdiction the Board would otherwise have under section 124?

9. We do not find support for this proposition in either the purpose or language of section 124. No subjects are specifically exempted from its reach, nor is there any general implication that the ambit of this provision is less than comprehensive. It is true that the existence of section 91 suggests that it is the primary route under the Act for resolving jurisdictional disputes. This does not mean, however, that it is so exclusive that it deprives the Board of jurisdiction to hear a grievance which otherwise meets the requirements of section 124.

10. Certainly the Board has made it clear that it does not regard section 124 as the preferred forum for hearing matters which may touch on jurisdictional disputes, and that it may defer its proceedings under that section to allow jurisdictional disputes to be heard in a more appropriate manner. (See *Napev Construction Limited*, [1979] OLRB Rep. Sept. 886 and *Eaman Riggs Limited*, [1978] OLRB Rep. March 228.) Commonly, the Board will be asked to adjourn section 124 proceedings to allow a party to file a complaint under section 91, or if a section 91 complaint

has already been filed, to defer a section 124 referral pending the disposition of the section 91 proceeding. The rationale for this is set out in *Napev Construction Limited*:

In a section 81 [now 91] complaint all trade unions and employers who may be affected by, or have an interest in the assignment of certain work may appear and participate in the proceedings, and the Board in reaching a decision is free to consider a broad range of relevant criteria. Further, once the Board makes a direction as to the assignment of work, the direction has the affect of overriding the terms of any collective agreements which do not conform with the direction. In our view, these factors mean that the resolution of disputes related to an assignment of work can be dealt with in a more appropriate manner in a section 81 [now 91] proceeding than at arbitration.

11. This is quite a different proposition than the assertion that the Board under section 124 has no jurisdiction to hear grievances which relate to work assignments. The Board's confidence in its jurisdiction under section 124 is reflected in its practice of adjourning the arbitration referral, rather than terminating it. It may be that even after a section 91 determination has been made, there will be other issues relating to the grievance which will require resolution, in which case the Board can resume proceedings under section 124.

12. Indeed, there have been instances in which the Board has been prepared to hear grievances which appear to relate to jurisdictional disputes, in the generic sense, under section 124. In *Lackie Industrial Contractors Limited*, (Board File No. 1018-85-M, unreported August 26, 1985) the Board had adjourned an arbitration referral to allow a party to file a complaint under section 91. When no complaint was filed, the arbitration proceedings were resumed under section 124. At that time the Board reiterated its general preference that jurisdictional disputes be heard in a forum in which all interested parties could fully participate. However, the Board stated that the purpose of such deferral was to ensure a complete and fair adjudication of the jurisdictional issue. If such an adjudication may not occur, the Board was prepared to hear the matter under section 124. In other words, the Board's policy of deferral is founded in its concept of the appropriate exercise of its jurisdiction, rather than in any lack of jurisdiction.

13. In support of its position that the Board lacked jurisdiction to hear this grievance under section 124, the respondents pointed to the existence of section 91(14) of the Act which provides as follows:

(14) The Board shall not inquire into a complaint made by a trade union, council of trade unions, employer or employers' organization that has entered into a collective agreement that contains a provision requiring the reference of any difference between them arising out of work assignment to a tribunal mutually selected by them with respect to any difference as to work assignment that can be resolved under the collective agreement, and such trade union, council of trade unions, employer or employers' organization shall do or abstain from doing anything required of it by the decision of such tribunal.

This provision may preclude a board from inquiring into a complaint under section 91(1) in the face of a dispute resolution mechanism contained in the collective agreement (see *Dominion Bridge Company Limited* [1982] OLRB Rep. May 667). However, it is difficult to conclude that section 91(14) deprives the Board of jurisdiction to hear a grievance referred under section 124, given the very absence of such a provision in the text of section 124, the comprehensive scope reflected in its language, the purpose of section 124 described earlier, and the reference to a "complaint" in section 91(14).

14. The Board may still chose to defer proceedings under section 124 to a dispute resolution mechanism in a collective agreement as a matter of policy, for the same good reasons it may defer to a section 91 application. In addition, the Board may find that the appropriate interpretation of

the collective agreement requires such deference, even when read in the context of the broad language of section 124. Indeed, it may be a rare occasion when the Board will actually hear a grievance concerning a contract violation which is in substance a jurisdictional dispute under section 124, given the unsuitability of this forum. However, the question is still whether the Board *should* defer a section 124 referral, not whether it *must* terminate the proceedings for lack of jurisdiction.

15. This characterization of the issue sheds some light on the respondents' evidentiary objection. If the Board's present task is to decide whether it should defer to other proceedings, the question of whether the applicant is required to satisfy or has already satisfied the procedures set out in the collective agreement is relevant. This is particularly so given that neither party nor the United Association have filed or intend to file a section 91 application. In fact the respondents and the United Association stated they would oppose any attempt on the part of the applicant to bring such an application on the basis that the dispute should be handled by the dispute procedures in the collective agreement. The United Association is thus explicitly asking us to defer to the collective agreement procedures, and this is the implicit effect of the respondents' statements as well. Under the circumstances, the question of whether such collective agreement provisions must be or have been satisfied is undoubtedly material to our determination. As a result, evidence adduced on this question is relevant in the sense of being potentially probative of a matter in issue. The respondents' evidentiary objection is therefore dismissed.

16. The matter is referred to the Registrar to be relisted for hearing.

2755-85-R Lyse Lebrun, Samuel (David) Wilson, Applicants, v. London and District Service Workers' Union Local 220, Service Employees International Union, Respondent, v. **Pioneer Youth Services Ltd.**, Intervener

Adjournment - Evidence - Petition - Termination - Collector of petition signatures unable to attend hearing due to employer denying time off - Applicants producing note from collector indicating that signatures on petition voluntary - Note rejected as hearsay evidence - Applicants having obligation to ensure attendance of witnesses at hearing by issuing summons - Adjournment denied

BEFORE: *Ian C. Springate*, Alternate Chairman, and Board Members *R. J. Swenor* and *W. F. Rutherford*.

APPEARANCES: *Lyse Lebrun, Samuel Wilson and David Shepherd* for the applicants; *Randy Levinson, Mike Morin and Angela Miller* for the respondent; *Charles R. Robertson* for the intervener.

DECISION OF IAN C. SPRINGATE, ALTERNATE CHAIRMAN, AND BOARD MEMBER W. F. RUTHERFORD; October 24, 1986

1. The name of the respondent is amended to read: "London and District Service Workers' Union Local 220, Service Employees International Union".

2. This is an application under section 57 of the *Labour Relations Act* for a declaration terminating bargaining rights. The respondent trade union is currently the bargaining agent for a unit of child care workers employed by the intervener employer. The employer operates residences in Kitchener, Waterloo and Guelph for young people in need of care.

3. The parties agree that the applicants have status to bring this application. They also agree that the application is timely.

4. Section 57(3) of the Act sets out the procedure the Board is to follow when considering an application under section 57:

Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as is determined under clause 103(2)(j) that they no longer wish to be represented by the trade union, and if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

5. On the date of the filing of the application there were 46 employees in the bargaining unit. Prior to the terminal date fixed for the application, there were filed four statements in the form of "petitions" indicating that those who signed them no longer wished to be represented by the respondent trade union. There was also filed a similar document signed by a single employee. In all these documents were signed by a total of 27 bargaining unit employees. It follows that over 45 per cent of the employees in the bargaining unit had signified in a timely fashion that they no longer wish to be represented by the trade union. The only issue is whether the signatures of the employees can be accepted as being voluntary.

6. There is an onus on applicants seeking a declaration terminating bargaining rights to lead evidence relating to the origination of documents filed in support of the application as well as the circumstances under which employee signatures on the documents were obtained. If the evidence indicates that management had no actual involvement in the origination and circulation of a petition in opposition to the union, and that the manner in which the petition was circulated would not likely give rise to a reasonable concern among employees of management involvement or that a refusal to sign the document might be communicated to management, the Board will generally accept the petition as a voluntary expression of employee views. However, given the delicate nature of the employer-employee relationship, if the evidence indicates actual management involvement with the petition, or that it would be reasonable for employees to conclude that there likely had been some management involvement, or that management would likely become aware of any refusal on their part to sign the document, the petition will not be accepted as representing the voluntary wishes of employees.

7. As indicated above, the onus is on the applicants in a case such as this to lead the evidence to establish the voluntariness of employee signatures on a petition. If the required evidence is not led, the Board will not be in a position to conclude that the signatures are voluntary. The applicants in the instant case were put on notice that they would be required to lead such evidence. On February 17, 1986 the Board's Registrar sent letters to each of the applicants which contained the following caution:

I would draw your attention to section 73 of the Board's Rules of Procedure as set out in Form 2 enclosed herewith. Evidence of signification by employees that they no longer wish to be represented by a trade union must be in the form provided for in section 73 of the Board's Rules, and must be filed with the Board not later than February 25, 1986, the terminal date set for this application.

The applicant will be required to attend the hearing in order to present its case to the Board and to speak to such issues as may arise in connection with this application. Failure of the applicant to appear at the hearing of this case, either in person or through an authorized representative, will result in the rejection by the Board of the application.

It should be noted that any employee or representative who appears at the hearing will be required to testify, or produce a witness or witnesses who will be able to testify from his or their personal knowledge and observation, as to (a) the circumstances concerning the origination of the material filed, and (b) the manner in which each of the signatures was obtained.

[emphasis added]

8. No evidence was led as to the circumstances relating to the origination or signing of the statement containing the signature of a single employee. Nor were any reasons advanced as to why such evidence was not forthcoming. In these circumstances we are unable to conclude that the document reflects a voluntary signification of the wishes of the employee who signed it.

9. We were advised that employee signatures were collected on the four petitions by the applicants, namely Lyse Lebrun and Samuel Wilson, as well as by two other employees, David Shepherd and Sherri Lightfoot. Miss Lebrun, Mr. Shepherd and Mr. Wilson testified as to the circumstances under which they collected employee signatures. On the basis of their testimony, we have no hesitation in concluding that employees who signed a petition at the request of either Mr. Wilson or Mr. Shepherd did so voluntarily. The situation with respect to signatures collected by Miss Lebrun is less clear. Miss Lebrun is the assistant house manager at one of the employer's residences. Although this is a position within the bargaining unit, Miss Lebrun does have some supervisory functions. Following a staff meeting at the residence where she is employed, Miss Lebrun asked the house manager, a managerial person excluded from the bargaining unit, to leave the room so that matters relating to the union could be discussed. The house manager left the room. Miss Lebrun then spoke in opposition to the union following which she asked the other employees present to sign a petition, which they did. Given Miss Lebrun's position and the events leading up to her discussion with the other employees about the petition, we have some concern that the employees might have concluded that Miss Lebrun was acting with the support of management. There is, however, no need to reach any definite conclusions with respect to this issue. Even if we assume that the signatures collected by Miss Lebrun reflected the voluntary wishes of the employees in question, this would not satisfy the requirements of section 57(3) in that Miss Lebrun, Mr. Wilson and Mr. Shepherd collected signatures from fewer than forty-five per cent of the employees in the bargaining unit.

10. As already indicated, we were advised that signatures were collected on one of the petitions by Miss Sherri Lightfoot. Miss Lightfoot was not in attendance at the hearing. Near the conclusion of the hearing the applicants produced a note claimed to be written by Miss Lightfoot in which she indicated that she had collected the signatures of staff at one of the residences and that the signatures were voluntary. The note also stated that Miss Lightfoot was unable to attend the hearing because she had not given the employer 30 days advance notice of her desire to be off. Counsel for the employer then advised the Board that Miss Lightfoot had requested a leave of absence for the day of the hearing without saying why she had wanted the leave, and that it had been denied by management since the request had not been made 30 days prior to the day in question. The employees who were in attendance at the hearing had apparently requested the day off more than 30 days previously. Counsel for the employer requested that the Board accept Miss Lightfoot's note as evidence of the voluntariness of the signatures on the petition or, in the alternative, schedule a continuation of the hearing so as to give Miss Lightfoot an opportunity to testify. The union strongly opposed both of these requests.

11. The note from Miss Lightfoot is a form of written hearsay. It was not made under oath and Miss Lightfoot was not available to be cross-examined by union counsel. In these circumstances we are unable to accept the note as establishing the voluntariness of any employee signatures.

12. The remaining issue is whether as proposed by employer counsel the hearing should be re-opened so as to allow the applicants to arrange for Miss Lightfoot's attendance. We believe not. The applicants were advised of their obligation to produce witnesses at the hearing who could testify with respect to the obtaining of signatures. The applicants could have ensured Miss Lightfoot's attendance at the hearing by issuing her a Summons to Witness. They did not do so, but rather appear to have been content to rely on Miss Lightfoot's own efforts to get time off to attend the hearing and, failing that, to rely on the note written by her. We believe the following reasoning of the Board in *Baycrest Centre of Geriatric Care*, [1976] OLRB Rep. Aug. 432 to be applicable to this case:

The Board policy with respect to adjournments has been capsulized in the *Nick Masney* case [1968] OLRB Rep. 823 (upheld in the Ontario Court of Appeal, 70 CLC 14,024) wherein the Board stated:

"... the Board's decision to deny the respondent's request for an adjournment was based on the Board's practice to grant adjournments only on consent of the parties or where the request is based on circumstances which are completely out of the control of the party making the request and where to proceed would seriously prejudice such party i.e., where it is proven that a witness essential to the party's case is unable to attend because of serious illness..."

The Board has held, in refusing to grant adjournments, that it is the responsibility of the complainant to do whatever is required to ensure that witnesses essential to its case are present at the hearing (see *Weston Bakeries* decision [1971] OLRB Rep. Jan. 30). The Board has further held that it is incumbent upon a party to properly prepare itself for a hearing which includes the obtaining and serving of the required summons (see: *Agilis Corporation Limited* decision [1971] O.L.R.B. Rep. Feb. 98)...

The purpose of a summons is to compel the attendance of witnesses at a hearing and as such it is an instrument which enables this Board to conduct its hearings at the appointed time and place and, more importantly, it is an instrument which provides a party with access to those witnesses who are essential to the presentation of its case. It is incumbent upon a party seeking the attendance of a witness(es) to avail itself of this instrument. Counsel can not decide against serving a potential witness, who had indicated that he will not attend, and then, in the face of the person's non-attendance, request an adjournment. If the Board (or any court for that matter) were to accede to such a request, it would be inviting manipulation of its procedure causing undue delay and consequent prejudice to parties appearing before it. The Board, therefore, restates that in the circumstance of this case it has no alternative but to deny the request for an adjournment.

13. The evidence before the Board falls short of establishing that 45 per cent of the employees in the bargaining unit have voluntarily signified that they no longer wish to be represented by the respondent. The application is accordingly dismissed.

DECISION OF BOARD MEMBER R. J. SWENOR;

1. I would allow the hearing to be re-opened to allow the Board to hear the evidence of Miss Lightfoot regarding the voluntariness of employee signatures. I believe it is the Board's duty to try to determine the true wishes of the employees in the bargaining unit and to do so in an equitable manner. Equity is not served if we do not let Miss Lightfoot be heard, particularly since it was an action by her employer that prevented her from attending the hearing.

2. I must also comment on the case cited in paragraph 12 of the majority decision. The Board found (as cited in paragraph 2) that "Counsel cannot decide against serving a potential witness, who had indicated that he will not attend, and then, in the face of the person's non-attendance, request an adjournment". I think it important to note that the applicants were not represented by counsel. While I recognize that ignorance of their rights to issue a Summons to Witness

should not automatically give them a second chance, my feelings are coloured by the difficulties faced by applicant/petitioners in obtaining counsel familiar with the Board's proceedings.

3. With respect to the reference (paragraph 9 of the majority decision) to the voluntariness of signatures obtained by Miss Lebrun, I do not believe this question should affect the hearing findings since the Board did not choose to deal with the question.

0680-86-R International Brotherhood of Electrical Workers Local Union 353, Applicant, v. 584317 Ontario Limited, carrying on business as R. & H. Electric Co.; Concept Electric Inc., Respondents

Certification - Construction Industry - Practice and Procedure - Whether s.144(1) containing limitation on eligibility of an affiliated bargaining agent to bring certification application - Respondent's employees not entitled to notice of hearings once written representations not filed - Bulk of employees affected by application working in territorial jurisdiction of another union local - Board not required to give local notice of legal consequences of application

BEFORE: *N. B. Satterfield*, Vice-Chairman, and Board Members *W. H. Wightman* and *J. Redshaw*.

APPEARANCES: *S.B.D. Wahl* and *M. Lloyd* for the applicant; *R. A. Werry*, *M. Contini*, *J. Vair* and *R. Moeser* for 584317 Ontario Limited carrying on business as R. & H. Electric Co.; *R. A. Werry*, *M. Contini*, *J. Vair* and *R. Pancer* for Concept Electric Inc.

DECISION OF THE BOARD; September 30, 1986

1. The name of the respondent R & H Electric has been amended to read: "584317 Ontario Limited, carrying on business as R. & H. Electric Co.". Pursuant to the decision of the Board, differently constituted, dated June 18, 1986, Concept Electric Inc. is added as a respondent.

2. This is an application for certification made under the construction industry provisions of the Act.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on December 12, 1977, the designated employee bargaining agency is the International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario.

4. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

5. In applications for certification which are filed under the construction industry provisions of the Act, the Board need not hold a hearing (see section 102(14) of the Act). There were several reasons in this application why it was necessary for the Board to list the application for hearing. Following the making of the application, the applicant requested that section 1(4) of the Act be applied. This made it necessary for the Board to extend the terminal date which had been set for the application for certification so that it could serve new notices of the application on the parties and the employees, as well as serve notice of the application under section 1(4) of the Act on the parties and the employees. The reply filed by the respondent 584317 Ontario Limited, carrying on business as R. & H. Electric Co. ("the respondent") also raised issues which required a hearing in order to receive the evidence and representations of the parties on those issues. The issues were set out in Schedule "A" to the reply as follows:

The Respondent notes that this Application for Certification relates to the Industrial, Commercial and Institutional sector of the Construction Industry. As a result, if successful, the Respondent will be bound to the Provincial Collective Agreement between The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario and the International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario (the "Provincial Agreement"), by operation of the Labour Relations Act.

The Respondent notes from Article 202 of the Provincial Agreement that the territorial jurisdiction of the Applicant trade Union, IBEW, Local 353, is limited to Toronto and surrounding area. It does not include Guelph. The said Article 202 indicates Guelph is within the territorial jurisdiction of IBEW, Local 804.

At the time this Application for Certification was made, only one employee in the bargaining unit described in the Application of the applicant was employed on a job within the territorial jurisdiction of Local 353. The other 12 employees in the bargaining unit described in the Application of the Applicant were employed on the AMC job in Guelph, within the territorial jurisdiction of Local 804.

In light of the provisions of Article 7.02 of the Collective Agreement, the Respondent respectfully submits that this Application is not properly brought by the Applicant, IBEW, Local 353. The Respondent submits that the granting of a certificate in this case would require it to dismiss the great majority of the electricians in its employ prior to the completion of its work within the territorial jurisdiction of Local 804 of the IBEW, pursuant to the provisions of Article 702 of the Provincial Agreement which the Respondent would be bound to by operation of law.

As a result, in these circumstances, the Respondent respectfully submits that this Application for Certification should be dismissed.

The Respondent further submits that the operation of the Labour Relations Act in these circumstances, should a certificate be granted to the Applicant union, is contrary to the Canadian Charter of Rights and Freedoms, and specifically Section 6(2)(b), and for this reason as well, the Application for Certification should be dismissed.

Further, the Respondent submits that Board Area 8, applied for by the Applicant Union, is not an appropriate geographic area within the meaning of Section 144(1) of the Labour Relations

Act in these circumstances. Therefore, the unit applied for is not an appropriate bargaining unit for certification in this case.

6. Notices of hearing into the application for certification and the application under section 1(4) of the Act were sent to the applicant and respondents. No notices of hearings were served on the employees. The notices of hearing set out the following purposes for the hearing:

- (1) whether R & H Electric or 584317 Ontario Limited carrying on business as R & H Electric and Concept Electric Inc. are associated or related businesses or activities under common control or direction within the meaning of section 1(4) of the *Labour Relations Act*; or in alternative,
- (2) whether R & H Electric and 584317 Ontario Limited carrying on business as R & H Electric and Concept Electric Ltd. are associated or related businesses or activities under common control or direction within the meaning of section 1(4) of the Act; and
- (3) all issues raised in Schedule "A" to the reply to the application from 584317 Ontario Limited carrying on business as R & H Electric dated June 18th, 1986, including the claims that the applicant lacks jurisdiction to bring this application under section 144(1) of the Act; the bargaining unit sought by the applicant is not appropriate; and, should a certificate be issued to the applicant, the claim that the operation of the *Labour Relations Act* in the circumstances of this application would be contrary to the Canadian Charter of Rights and Freedoms, specifically section 6(2)(b).

7. At the hearing, counsel for the respondent reiterated and elaborated upon the submissions in Appendix "A" to the reply in support of a preliminary motion that the Board either should dismiss the application for certification or adjourn it. In the course of making his submissions in support of the motion, counsel told the Board that the respondent was not pursuing the claim that the operation of the *Labour Relations Act* in the circumstances of this application for certification would be contrary to section 6(2)(b) of the Canadian Charter of Rights and Freedoms.

8. The grounds argued by counsel in support of the request that the Board dismiss the application for certification were those set out in the reply. In other words, the application for certification should be dismissed because the applicant was not the appropriate affiliated bargaining agent of the electricians designated employee bargaining agency to be making this application, since of the 12 or 13 employees affected by it, only one was employed at the time of the application within the applicant's territorial jurisdiction under the electricians provincial agreement and, further, because the unit of employees sought by the applicant was not appropriate.

9. The respondent's request that the Board adjourn the proceedings was made in the alternative should the Board not dismiss it. In support of the request, respondent counsel argued that Local 804 of the International Brotherhood of Electrical Workers, an affiliated bargaining agent of the electricians designated employee bargaining agency, should have been given notice of the hearing because its interests were affected by the bargaining unit issue and because the bulk of the employees affected by the application were working in Local 804's territorial jurisdiction under the provincial agreement when the application was made. Respondent counsel contended that the employment of those employees would be at risk if a certificate issued to the applicant and that this circumstance together with the application under section 1(4) of the Act created sufficiently unusual circumstances that the Board should have served notice of the hearing on the employees.

10. The theory of counsel's claim that the employees working in Local 804's territorial jurisdiction would be at risk of losing their employment is as follows. Section 145 of the Act would operate to bind the applicant and the employer of those employees to the electricians provincial agreement as soon as certificates issued to the applicant under section 144(2) of the Act. That agreement, according to counsel, would operate in turn to cause the employer to discharge all but

one of these employees because of the provisions of Clause 702 - Non-Resident Contractors of the Agreement. It reads as follows:

Any non-resident contractor undertaking any electrical work within the jurisdiction of a Local Union shall be allowed to bring in only one (1) experienced electrical representative for each job or project. Such representative shall be a member of the IBEW and shall register at the Local Union Office and be issued a Working Card.

11. Respondent counsel's argument that the application should be dismissed because the bargaining unit sought is not appropriate is founded on the meaning to be given to the phrase "... at least one appropriate geographic area ..." in section 144(1) of the Act. The applicant is applying for certification with respect to a bargaining unit described in terms of all electricians and electricians' apprentices employed by R. & H. Electric Co. in the industrial, commercial and institutional ("ICI") sector of the construction industry in the Province of Ontario and all electricians and electricians' apprentices employed by R & H. Electric Co. in all other sectors of the construction industry in the Board's geographic area #8. Counsel argues that there was only one employee employed in Board area #8 on the making of this application, the remainder being employed in Board area #7. Since Board area #8 falls within the territorial jurisdiction of the applicant, counsel contends that it is the appropriate geographic area for the applicant, but the circumstances of this case render it inappropriate. Those circumstances, according to counsel, are that only one of the electricians employed by the respondent was employed in Board area #8 on the application date. The remaining 12 were employed in Board area #7. Thus, the argument continues, should two certificates be issued as provided by section 144(2) of the Act, one must be confined to the ICI sector and the other one is to be issued "... in relation to all other sectors in the appropriate geographic area or areas". In this case, if Board area #8 were found to be the appropriate area, it would mean a certificate would be issued respecting an area in which only one employee was working at the making of the application. Since that certificate would describe a unit of employees and, since section 6(1) of the Act mandates that a unit of employees determined by the Board to be appropriate for collective bargaining "... in every case ... shall consist of more than one employee ...", respondent counsel contends that the unit described for Board area #8 would not be appropriate. On the other hand, counsel argues, while Board area #7 would be an appropriate area were Local 804 the applicant, Local 353 has no jurisdiction under the provincial agreement for that area, thus it would not be an appropriate geographic area for the applicant.

12. The Board recessed the hearing to consider the parties' submissions on the preliminary motion. When the Board reconvened the hearing and before making its ruling, applicant counsel advised the Board that he was newly informed that, on the date of application, there was more than one electrician employed by the respondent within Board area #8 and the applicant had a witness present at the hearing to testify to that effect. The Board advised the parties that it would deal with that circumstance in the course of making its ruling, whereupon the Board rendered the following ruling orally:

Respecting Local 353's standing to bring the application, section 144(1) of the *Labour Relations Act* permits any affiliated bargaining agent of a designated employee bargaining agency to make an application for certification under the section on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency. Section 144 contains no express limitation which would require that a particular affiliated bargaining agent of an employee bargaining agency bring an application in particular circumstances. Had it been the intention to limit the eligibility of an affiliated bargaining agent to bring an application for certification in certain circumstances, in the Board's view, the limitation would have been expressed

in the section. Therefore, since Local 353 is an affiliated bargaining agent of the electricians employee bargaining agency, it is an affiliated bargaining agent entitled to bring this application under section 144(1) of the Act.

With respect to the issue of proper notice, notices of the application for certification and of the application to have section 1(4) apply to it were served in the Board's customary manner on the respondent, including the notices to employees which the respondent is required to post. The notices to employees of the application for certification and of the request to have section 1(4) applied to it contain the express caution that the Board may dispose of the applications without further notices to the employees, unless they have made written representations to the Board by the terminal date set for the applications. No written representations were made in either application. The Act and the Rules of Practice thereunder relating to the construction industry do not require the Board to serve on employees notices of hearings respecting applications for certification or section 1(4), except in the case of an application for certification in which the Board has received duly filed written representations from an employee. In keeping with the cautionary statement to employees in the notices, it has been the Board's consistent practice to serve notices of hearings into applications for certification or under section 1(4) of the Act only on employees who have made written representations. The Board has proceeded in this case in accordance with that practice and the Board does not consider the circumstances of the case to warrant proceeding in the manner argued. Nor does the Board consider that Local 804 was entitled to notice of the application absent any allegations or evidence that it represents any of the employees.

Finally, respecting the claim that the employees and Local 804 should be given notice because of the potential effect of Article 702 of the electricians provincial agreement, what the respondent is requesting is that the Board give notice of the legal consequences of the applications. The Board is not obligated by the Act, its Rules of Practice or any duty of fairness to give notice of the legal consequences of any application under the Act.

For the foregoing reasons, the Board dismisses the respondent's motion that the application for certification be dismissed for want of standing by Local 353 to bring it and that the hearing into the application for certification and the request to apply section 1(4) of the Act to it be adjourned on the grounds argued respecting notice to the employees and to Local 804.

The Board will reserve its decision respecting the motion to dismiss the certification application because the bargaining unit sought is not appropriate and hear the evidence respecting whether there was more than one employee at work in the proposed bargaining unit in Board area #8 on the date of making of the application.

13. The Board proceeded to hear the testimony of Alin McWalters who was called by the applicant to testify in support of the applicant's claim that there was more than one employee at work on the application date. For reasons given orally at the hearing during respondent counsel's cross-examination of McWalters, the Board consented to counsel's request for an adjournment. The Board also set September 29, 1986 for continuation of hearing into the issue of whether there

was more than one electrician at work in the bargaining unit in Board area #8 on the date of the application.

14. When the application came back on for hearing on September 29th, the parties entered into the following agreement:

International Brotherhood of Electrical Workers Local Union 353

Applicant

584317 Ontario Limited c.o.b. as R. & H. Electric Co. Concept Electric Inc.

Respondents.

OLRB File No: 0680-86-R

All parties to the above captioned Application for Certification agree to settle their differences as follows:

1. The appropriate bargaining unit is agreed as follows:

(a) All Electricians and electrician apprentices in the employ of 584317 Ontario Limited c.o.b. as R & H Electric Co. ("R & H");

i) in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario; and

ii) in all other sectors of the construction industry in OLRB geographic area 8;

save and except non-working foremen and persons above the rank of non-working foreman.

2. R & H acknowledges and agrees that upon issuance of a certificate with respect to the bargaining unit agreed in paragraph 1 hereof, R & H is bound by and must observe the Principal Agreement between The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario and the International Brotherhood of Electrical Workers and the I.B.E.W. Construction Council of Ontario effective from May 1, 1986 until April 30, 1988 ("the Principal Agreement").

3. Concept Electric Inc. ("Concept") acknowledges and agrees as follows:

(a) Concept has not directly hired or employed electricians or electrician apprentices at any time prior to the date hereof.

(b) Concept must, should it wish to do so, hire directly and employ as electricians or electrician apprentices, only members in good standing of the Applicant in accordance with the provisions of the Principal Agreement for work falling within the scope of the Principal Agreement.

(c) Concept must contract, sub-contract or sub-let all work covered by the Principal Agreement to an employer bound by the Principal Agreement or perform such work with direct employees hired in accordance with paragraph 3(b) above and in all such cases the direct employee electricians and electricians apprentices must be employed in accordance with the terms and conditions of the Principal Agreement.

(d) The obligations contained in paragraphs 3(b) and (c) shall apply for the period of 1 year from the date hereof and not thereafter.

4. Ron Moeser acknowledges and agrees to pay the assessment of fine of \$2500.00 forthwith to the Applicant in respect of the Local Union 353 trial board assessment. Further Local Union

Business Manager Robt. Ryne agrees to request a reconsideration by the Local Union Trial Board of the additional assessment only of \$1500.00 levied against Ron Moeser. The Applicant and Ron Moeser agree to be bound by the decision of the Local Union Trial Board with respect to this issue of reconsideration subject to all rights of appeal under the IBEW constitution. Upon payment of the assessment of \$2500.00 and pending the proceedings for reconsideration the Applicant shall issue a Clearance Card to Ron Moeser.

5. The parties agree that the issues of Successor Employer under s. 63 and Single Employer for purposes of Labour Relations under s. 1(4) is to be adjourned Sine Die for the period of 1 year from the date hereof. Further the parties agree that the issue of delay as it relates to these issues shall not be presented and argued before the Labour Relations Board and shall not be to the prejudice of the Applicant.

6. The parties agree that the jobs listed below, being performed by R & H shall be exempted for the purposes of wage rates only from the provisions of the Principal Agreement. For purposes of clarity all other terms and conditions of the Principal Agreement are to be fully operative:

Ralston Purina

Whitby Mall

Milton Meadows

American Motors

Any new jobs at these locations are not exempt from the Wage Rates of the Principal Agreement.

7. It is understood and agreed that Concept is undertaking the obligations contained in paragraph 3 hereof without prejudice to its position that it is not a related employer to R & H within the meaning of s. 1(4) of the Labour Relations Act nor a successor employer within the meaning of s. 63 of the Labour Relations Act. Further, it is understood and agreed that Concept will not be considered to be bound by the Principal Agreement by virtue of undertaking the obligations in paragraph 3 hereof.

8. All outstanding issues in these certification proceedings are settled hereby.

DATED AT TORONTO this 29th day of September, 1986.

For the Applicant

"Michael Edin Lloyd"

584317 Ontario Limited c.o.b. as R. & H. Electric Co.

For R & H

"R. Moeser"

Concept Electric Inc.

For Concept

"Illegible Signature"

15. Having regard to the agreement of the parties, the Board further finds that all electricians and electricians' apprentices in the employ of 584317 Ontario Limited, carrying on business as R. & H. Electric Co. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians and electricians' apprentices in the employ of 584317 Ontario Limited, carrying on business as R. & H. Electric Co. in all other sectors in The

Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of 584317 Ontario Limited, carrying on business as R. & H. Electric Co. appropriate for collective bargaining.

16. The applicant filed eleven combination applications for membership and receipts. The combination applications for membership are signed by the employees and the receipts are countersigned and indicate that a payment of \$1.00 has been made within the six-month period immediately preceding the terminal date of the application. The money was collected by one person. The applicant also filed a duly completed Form 80, Declaration Concerning Membership Documents, Construction Industry.

17. 584317 Ontario Limited, carrying on business as R. & H. Electric Co., filed a reply, a list of employees containing 13 names on Schedule "A" and specimen signatures.

18. Ten of the membership documents filed by the applicant were filed on behalf of employees whose names appear on the list filed by 584317 Ontario Limited, carrying on business as R. & H. Electric Co. Therefore, on the evidence before it, the Board is satisfied that more than fifty-five per cent of the employees of 584317 Ontario Limited, carrying on business as R. & H. Electric Co., in the bargaining unit, at the time the application was made, were members of the applicant on June 18, 1986, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

19. Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 3 above in respect of all electricians and electricians' apprentices in the employ of 584317 Ontario Limited, carrying on business as R. & H. Electric Co. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

20. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all electricians and electricians' apprentices in the employ of 584317 Ontario Limited, carrying on business as R. & H. Electric Co. in The Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

21. Having further regard to the agreement of the parties, the application under section 1(4) of the *Labour Relations Act* for a declaration that R. & H. Electric or 584317 Ontario Limited carrying on business as R. & H. Electric Co. and Concept Electric Inc. are associated or related businesses or activities under common control or direction is adjourned *sine die*. At the expiry of one year from the date hereof, the application will be deemed to have been withdrawn and the Board's record endorsed accordingly without further notice to the parties unless, within that period of time, a party has requested the Board to schedule the matter for hearing. In the result, the hearings scheduled for this application on October 22nd and 23rd, 1986 are adjourned.

22. This panel of the Board is not seized with the application made under section 1(4) of the Act.
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2369-84-U Angelo Ritrovato, Complainant, v. International Union of Operating Engineers, Local 793, Respondent

Duty of Fair Representation - Remedies - Unfair Labour Practice - Company refusing to accept complainant on job site following work stoppage - Failure to give complainant opportunity to explain role in work stoppage and to inform of decision not to process grievance constituting breach of duty - Failure to name employer in complaint - Board awarding damages for loss of opportunity to have grievance arbitrated

BEFORE: *Robert D. Howe*, Vice-Chairman.

APPEARANCES: *Yvon Renaud* for the complainant; *B. Chercover, J. Kennedy* and *G. Palanuk* for the respondent.

DECISION OF THE BOARD; October 27, 1986

1. In this complaint to the Board under section 89 of the *Labour Relations Act*, the complainant, Angelo Ritrovato, alleges that he has been dealt with by the respondent (also referred to in this decision as the "Union" and as "Local 793") contrary to the provisions of sections 68 and 69 of the Act.

2. Paragraph 4 of the complaint describes the acts and omissions complained of as follows:

(1) On or about April 15, 1982 the grievor was dealt with by George Palanuk, business agent of the International Union of Operating Engineers Local 793 (hereinafter "Palanuk") contrary to the provisions of section 68 of the *Labour Relations Act* in that he did on his own behalf or on behalf of the respondent; fail to research, and prepare and pursue a grievance against the complainant's employer Pitts Atlantic or, in the alternative, did so too late, in connection with an improper dismissal of the complainant for his activities as health and safety representative while in the employ of Pitts Atlantic;

(2) On or about July 22, 1982, the grievor was dealt with by Palanuk contrary to section 68 of the Act in that Palanuk did fail to research, prepare and pursue a grievance against said Pitts Atlantic, or in the alternative did so too late, in connection with the refusal by the said Pitts Atlantic to rehire the complainant; and

(3) On or about July 22, 1982, and during the months following the grievor was dealt with by Palanuk contrary to section 69 of the Act in that Palanuk did fail to call or otherwise communicate with the complainant regarding employment notwithstanding that the complainant had left at least two telephone numbers where he could be reached and that Palanuk did fail to call upon the complainant in the order of the unemployed list thereby passing over the complainant's name.

3. In an unreported decision dated May 21, 1985 respecting this complaint, the Board wrote, in part, as follows:

3. In its reply to the complaint, the respondent disputed the allegations in the complaint and put the complainant to the strict proof of his complaint. The respondent also submitted in its reply

that the complaint "should be dismissed on the ground of laches". At the commencement of the hearing of this matter on April 15, 1985 in Sault Ste. Marie, counsel for the respondent advised the Board that he intended to pursue, as a preliminary matter, his client's contention that the Board, in the exercise of its discretion under section 89(4) of the Act, should dismiss this complaint on the basis of extreme delay on the part of the complainant. After hearing the submissions of the parties concerning that matter, the hearing was adjourned to afford the Board an opportunity to consider those submissions and to provide the parties with a written decision concerning that threshold issue.

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18. Although the length of time which elapsed between the events which form the subject matter of this complaint and the date on which the complaint was filed must be a matter of concern to this Board, I have decided, on balance, that it is appropriate to proceed with a hearing on the merits and to take the period of undue delay into account in determining the appropriate remedy, if any, to be granted to the complainant in the event that his complaint succeeds on the merits....

19. For the foregoing reasons, the Board, in the exercise of its discretion under section 89(4) of the Act, hereby declines to dismiss the complaint at this stage of the proceedings on the basis of delay on the part of the complainant.

20. The Registrar is directed to list this matter for continuation of hearing. Having regard to the submissions of counsel concerning the location of future hearings in respect of this matter, (unless otherwise agreed by the parties) the venue for the hearing will be Sault Ste. Marie for that part of the proceedings devoted to presentation of the complainant's case in chief, and Toronto for that part of the proceedings devoted to presentation of the respondent's defence. The location of the remainder of the proceedings will be determined by the Board in consultation with counsel in the event that the parties are unable to reach agreement on that matter.

4. In accordance with that direction, the hearing of this matter continued on November 12, November 13, and December 12, 1985, in Sault Ste. Marie, and on February 17 and 18, and June 18, 19, and 20, 1986, in Toronto. During those eight days of hearing, the Board heard the evidence of eleven witnesses. In addition to that oral evidence, 21 exhibits were entered during the course of these proceedings. In making the findings of fact set forth in this decision, the Board has carefully considered all of that oral and documentary evidence, the submissions of the parties concerning that evidence, and such factors as the firmness of the witnesses' respective memories, their ability to resist the influence of self-interest to modify their recollections, the consistency of their evidence, their capacity to express their recollections clearly, and their demeanour. We have also assessed what is most probable in the circumstances of the case, and what inferences may reasonably be drawn from the totality of the evidence.

5. At the conclusion of the complainant's case in chief, respondent's counsel requested that the complaint be dismissed on the grounds that there was no case for the respondent to meet. After hearing the submissions of counsel, the Board reserved its decision on that matter and called upon the respondent to elect whether or not to adduce any evidence. Since the respondent elected to call evidence (and subsequently argued the case on the basis of the totality of the evidence), it is unnecessary to make a ruling on that non-suit motion, which has become redundant in the circumstances of this case.

6. The complainant became a member of Local 793 in 1981 and thereby became eligible for job referrals through its "hiring hall". He was originally on the Union's "D body" out-of-work list, but subsequently requested to have his name placed on the "B body" out-of-work list. In doing so, he agreed that when he became less financially strapped he would pay the \$307 fee that was required of persons on that list. That arrangement was made with George Palanuk, who has been a business representative for Local 793 since 1978. Mr. Palanuk was appointed to that full-

time, salaried position by Joe Kennedy, Local 793's Business Manager. Mr. Palanuk's responsibilities include the operation of the Union's "hiring hall" for the Sault Ste. Marie area. As a result of being placed on the "B body" out-of-work list, Mr. Ritrovato had access to higher paying jobs, such as rock truck driver and bulldozer operator, which were not available to persons on the "D body" out-of-work list.

7. It is common ground between the parties that at all material times the complainant was qualified to operate all types of heavy equipment (including bulldozers, loaders, trucks, and fork-lifts), except those requiring a licenced operator. He was referred to Pitts Atlantic Construction Limited (which subsequently became "Pitts Engineering Construction Limited", and which will be referred to in this decision as "Pitts" and as the "Company", for ease of reference) on October 26, 1981 as a rock truck driver at the Great Lakes Power Project (the "project"), in response to a call to the Union by Pitts pursuant to Article 3 of the (May 1, 1980 - May 30, 1982) Provincial Agreement, which provided, in part, as follows:

ARTICLE 3 - UNION SECURITY

- 3.1 a) The Employer shall first call the Union Office whenever personnel are required. If the Union cannot supply such personnel within 48 hours, excluding Saturdays, Sundays and Holidays, the Employer may secure such personnel from any other source. The Employer may recall former regular employees through the Union Office who have been absent from the Employer up to six (6) months.
- b) Regular employees shall be defined as employees hired at the Employer's home base and who have been on the Employer's payroll for six (6) months or more.
- 3.2 All personnel hired shall be required to have a clearance card issued by the Union before they start to work, unless other arrangements are made with the Union dispatcher. Such clearance card will not be unreasonably withheld.

8. The rock truck which the complainant operated on the project was an off-road vehicle with a 35 ton capacity. In November of 1981, the complainant and several other rock truck drivers referred to the project by Local 793 were engaged in building a dyke across the St. Marys River at a location at which the current was quite swift and the water was 23 feet deep. Since he and the other rock truck drivers were concerned about the safety of backing up to the edge of the water without the assistance of a flagman, Mr. Ritrovato discussed the matter with his Union Steward, Donald Redmond, who in turn raised it with Ez Cloutier, the General Foreman in charge of rock excavation on the project. Mr. Cloutier temporarily resolved the problem by arranging for foremen to flag the drivers until arrangements could be made for some labourers to serve as flagmen. During the course of discussing the matter, Mr. Cloutier told Mr. Redmond that if anyone gave him any more problems, he was going to let them go. When Mr. Redmond told Mr. Palanuk what Mr. Cloutier had said, Mr. Palanuk stated that if Pitts laid off or dismissed anyone for that reason, he would send the person back to the project as soon as the Company requested the Union to refer a worker there.

9. Edward Ackison, Pitt's Assistant Project Manager, was summoned to these proceedings by the Union and called as one of its six witnesses. He told the Board that an issue was raised by Mr. Ritrovato concerning the need for a "spotter" at the "rock face", where a large loader, sometimes in conjunction with a bulldozer, was loading the rock trucks in an area at the bottom of the river bed through which streams were flowing. Management did not think it was safe to introduce a worker on foot into that environment and the Health and Safety Branch of the Ministry of Labour, which was called in to investigate the matter, did not require Pitts to place a "spotter" there. When asked in cross-examination if he took Mr. Ritrovato's concern about backing up without a flagman

to be unreasonable, Mr. Ackison replied, "I took it to be unreasonable that he did not appear to be able to accept the decision of the Ministry of Labour. It seemed to bear heavily on him."

10. Pitts laid off the complainant on December 7, 1981. Mr. Ritrovato did not (and does not) question the validity of that lay-off, as several other employees were laid off at the same time and there had been a shortage of work for three or four days before that. Two days after that lay-off, Mr. Palanuk offered Mr. Ritrovato a "C body" referral to the project as a fuel truck driver. However, Mr. Ritrovato declined that referral because the wage rate for fuel truck drivers was less than that paid to rock truck drivers. He also declined another referral to the project as a fuel truck driver on January 28, 1982. However, he accepted a referral to work as the "front end man" on a crane for another employer. When he learned that some of the other rock truck drivers who had been laid off from the project before Christmas had returned to work, the complainant telephoned Mr. Palanuk on February 3, 1982 to ask why he had not also been referred back. Mr. Palanuk replied that Pitts did not want him back as he had refused to back up without a flagman. (In giving that response, Mr. Palanuk was repeating an opinion which had been expressed to him by Mr. Redmond. No one from Pitts' management ever indicated to him that the Company did not want Mr. Ritrovato on the project because of his work refusal or his involvement in any other safety matters.) Mr. Ritrovato was very upset with that response and threatened to contact the Ministry of Labour concerning the matter on the grounds that it was illegal to require a driver to back up in an unsafe manner. Mr. Palanuk told the complainant to "cool down" and undertook to get back to him about the matter. When he called Mr. Ritrovato between 10:00 and 11:00 that evening, Mr. Palanuk told him that he was to report for work the next morning at the project. Mr. Ritrovato's name was not on the top of the applicable out-of-work list at that time. However, Mr. Palanuk decided to refer him back to the project because he had been working there prior to the Christmas shutdown. Mr. Palanuk also exercised his hiring hall discretion in a similar manner in respect of other persons who had been employed on the project prior to the lay-offs which preceded that shutdown.

11. When Mr. Ritrovato reported to the project on February 4, 1982, his foreman, Ivan Gignac, told him, "We don't want you. We asked for a bulldozer operator." Mr. Ritrovato then requested and was given an opportunity to confer with Mr. Redmond, who told him to wait in the lunchroom trailer. He waited there until approximately 11:00 a.m. when Mr. Gignac returned and advised him that John Minderlein, the Project Manager, wanted to see him. Mr. Ritrovato proceeded to the Project Manager's office, where Mr. Minderlein told him that the Company was going to hire him back, but warned him to "keep his nose clean". He also told him to back up his truck when he was told to do so. In the ensuing discussion, Mr. Ritrovato asserted that it was illegal to back up in an area that was unsafe, or in a situation where his vision was obscured. Mr. Minderlein agreed with that assertion and sent Mr. Ritrovato out to work as a rock truck driver.

12. During the second week of February, Mr. Ritrovato was approached by stewards of the various trades on the site and was asked if he was interested in becoming the employees' health and safety representative on the project. That position had previously been held by Rick Arnill, another member of Local 793. When the stewards were discussing the matter of a replacement for Mr. Arnill, who had resigned from the position, Mr. Ritrovato's name came up. Before approaching the complainant to offer him the position, the stewards spoke with the employees and obtained their approval. After taking some time to consider the matter, Mr. Ritrovato advised the stewards that he had decided to accept the position.

13. A few days after becoming the employees' health and safety representative, Mr. Ritrovato approached Mr. Cloutier and indicated that he was unwilling to drive his rock truck past the blasting crew because he was of the opinion that they were creating an unsafe working environ-

ment by smoking while carrying blasting caps and sticks of dynamite. Mr. Ritrovato testified that this angered Mr. Cloutier and also Mr. Minderlein. According to Mr. Ritrovato, upon learning of his work refusal, Mr. Minderlein approached him and told him in a very loud voice to “smarten up”. Mr. Ritrovato further testified that when he continued to insist that the blasting crew was making the area unsafe by smoking, Mr. Minderlein told him that he would not be working on the project very long. It was also the complainant’s evidence that he was told by Mr. Ackison, in the presence of Mr. Minderlein and Mr. Cloutier, that management was going to get rid of him as a health and safety representative because they did not like his complaint about the blasters smoking near explosives. Mr. Ackison, on the other hand, told the Board that he was certain that he had never made such a statement. I found Mr. Ackison to be a candid and credible witness, whose evidence was, in my view, more reliable than that of Mr. Ritrovato, who tended to tailor his evidence to advance his present concerns, and was also prone to somewhat embellish and exaggerate events. Accordingly, I prefer the evidence of Mr. Ackison concerning that matter and concerning all other matters about which their evidence is in conflict. Mr. Ritrovato’s lack of credibility concerning those matters also casts doubt on the reliability of his evidence concerning other matters, such as the aforementioned statements which he claimed to have been made to him by Mr. Minderlein.

14. Later that day, management posted notice that a health and safety representative would be elected by the employees on the following morning. Having regard to all of the evidence, I find on the balance of probabilities that the election was prompted by the blasters’ dissatisfaction with Mr. Ritrovato’s performance as a health and safety representative, rather than by a desire on the part of management to have him removed from that position. The election was overseen by Pat Hayes-Sheen, an official of the Occupational Health and Safety Division of the Ministry of Labour in Sault Ste. Marie. In that election the blasting crew voted for Mike MacDonald, but the operating engineers and members of other trades voted to retain Mr. Ritrovato as their health and safety representative. Following discussions with management and Mr. Hayes-Sheen, it was decided that Mr. MacDonald would be the health and safety representative for the blasting crew on the west side of the project, and that Mr. Ritrovato would be the health and safety representative for the employees on the east side of the project. In that capacity, Mr. Ritrovato attended safety meetings with Company officials and voiced a number of health and safety complaints to management on behalf of himself and other employees.

15. The complainant was laid off by Pitts on Thursday afternoon April 15, 1982, along with Barry Alberta, another Union member who had been working as a rock truck driver. Some workers in other trades were also laid off at or about that time. The reason given by the Company for the lay-off was shortage of work. However, the complainant was of the view that the true reason for his lay-off was the role which he had played as a health and safety representative on the project. On the morning of April 15, Pitts had begun to dig a trench from the river bed to the canal. The complainant had been assigned to drive one of the two rock trucks involved in that part of the project, and had been instructed to back the truck across a Parks Canada roadway, which was used by some pedestrians. The complainant had advised Mr. Cloutier that he thought it was unsafe and illegal to back across that road without a flagman. After arranging for another rock truck driver to perform the work which Mr. Ritrovato refused to perform without a flagman, Mr. Cloutier had given the complainant another work assignment which involved using a payloador to remove rock from the river bed. He had remained on that job until the afternoon coffee break, during which Mr. Gignac had advised him that he and Barry Alberta were being laid off. Mr. Gignac had told the complainant that he would be paid for the rest of the day and had instructed him to go to the office to pick up his pay. Mr. Ackison told the Board that the Company is required by the Provincial Agreement to give employees one hour’s notice of layoff. It was also his uncontradicted evidence that if there was no further work for them to do, the Company would send them home early and pay them for the balance of the day, in lieu of notice.

16. Mr. Ritrovato did not know Mr. Alberta before he began to work on the project. However, he became acquainted with him at the project as they were working in the same area. Since Mr. Alberta's residence was on his way to the project, Mr. Ritrovato often drove him to work. Mr. Ritrovato told the Board that he was of the view that Mr. Alberta was laid off on April 15 because of Mr. Alberta's association with him, and because the Company wished to mask an anti-safety motivation for the complainant's lay-off.

17. Mr. Ackison testified that Mr. Ritrovato was laid off on April 15, along with other employees including Mr. Alberta, because at that stage of the project, rock trucks were not needed on the same steady basis on which they had previously been required. Mr. Ritrovato was one of the persons selected for lay-off because he was one of the last persons hired as a rock truck driver and because he had less versatility than some of the other employees, having operated no equipment for Pitts other than a rock truck and a payloader. Mr. Ackison also told the Board that Mr. Ritrovato's position as a health and safety representative had nothing to do with his lay-off, and that Mr. Alberta's association with Mr. Ritrovato had nothing to do with Mr. Alberta's lay-off, which also resulted from a shortage of work. It was also his evidence that when Pitts subsequently needed to use a rock truck on a sporadic basis, an operator from another piece of equipment, such as a bulldozer, would be temporarily assigned to operate a rock truck.

18. On the afternoon of his lay-off, the complainant telephoned the Union office and asked to speak with Mr. Palanuk. Since Mr. Palanuk was not in the office at the time, Mr. Ritrovato advised Mr. Palanuk's secretary that he had been laid off by Pitts. He requested that his name be placed on the out-of-work list. He also requested the secretary to have Mr. Palanuk call him as soon as possible. Mr. Palanuk was unable to return Mr. Ritrovato's call that day as he was occupied with other matters. On the following morning, Mr. Palanuk spoke on the telephone at length with Mr. Redmond, who advised him that Mr. Ritrovato suspected that he had been laid off because of his involvement in safety matters on the project. Mr. Palanuk made several attempts to telephone Mr. Ritrovato on the morning of April 16 but was unable to reach him. The line was busy during his first few attempts and later, when the phone did ring, there was no answer.

19. Mr. Palanuk went to the project at 1:15 p.m. on April 16 where he and Mr. Redmond met with Mr. Minderlein. Mr. Minderlein explained to them that the decision to lay off a number of employees, including Mr. Ritrovato and Mr. Alberta, had been made at a management meeting between 9:00 and 9:30 a.m. on the previous day. When Mr. Palanuk attempted to persuade Mr. Minderlein to revoke Mr. Ritrovato's layoff, Mr. Minderlein told him that it was difficult to communicate with Mr. Ritrovato, that he had not wanted Mr. Ritrovato on the project in the first place, and that he was not going to rescind his lay-off. When Mr. Redmond expressed the opinion that Mr. Ritrovato had been laid off because of his safety activities, Mr. Minderlein became quite angry and walked away from them. The evidence also indicates that Mr. Minderlein's criticism of Mr. Ritrovato was not unusual, as Mr. Minderlein complained about a number of the workers whom Mr. Palanuk referred to the site. Thus, Mr. Minderlein's criticism of Mr. Ritrovato was no different from his criticism of a number of other Union members referred to the project, who were not sufficiently versatile or productive to satisfy Mr. Minderlein.

20. Mr. Palanuk remained at the project until 3:00 o'clock that afternoon, gathering as much information as he could about the lay-off. He spoke with Mr. Ackison, who advised him that the reduction in the work force had resulted from the Company's decreased need for rock truck work at that stage of the project. Mr. Palanuk reviewed Pitts' documentation concerning the lay-offs, including weekly manpower reports and unemployment insurance separation slips.

21. After returning to the Union office, Mr. Palanuk tried once again to telephone Mr.

Ritrovato but there was no answer. He also attempted unsuccessfully to telephone Peter Mazurski, the Regional Manager of the Ministry of Labour's Health and Safety Division. Mr. Palanuk also spoke with business representatives of the Carpenters and the Labourers on April 16 concerning the matter of whether a safety representative had any special protection against lay-off.

22. Mr. Palanuk was unable to recall whether he attempted to telephone the complainant on Saturday April 17. However, he did recall telephoning Mr. Ritrovato's parents in an unsuccessful attempt to contact him at their home. On Monday April 19, Mr. Palanuk made several further unsuccessful attempts to reach Mr. Ritrovato by telephone at his apartment and at his parents' home. He also telephoned Mr. Mazurski's office in Thunder Bay again and left a request that his call be returned. When Mr. Palanuk ultimately contacted the complainant on or about April 19, Mr. Ritrovato told him that he thought he had been laid off unfairly. Mr. Ritrovato did not at that time request Mr. Palanuk to file a grievance concerning his lay-off, but did ask Mr. Palanuk to get him back to work.

23. When Mr. Mazurski telephoned Mr. Palanuk on April 20, they had a lengthy discussion concerning Mr. Ritrovato's lay-off. Mr. Palanuk stated that he and the other business representatives with whom he had spoken did not feel that it was proper for a safety representative to be laid off. Mr. Mazurski advised him that the *Occupational Health and Safety Act* does not protect a safety representative from the effects of a lay-off resulting from a shortage of work. However, he undertook to have the lay-off investigated by Frank Cloutier, a member of his staff. On the following day Mr. Cloutier telephoned Mr. Palanuk and advised him that, as a result of attending at the project to investigate the matter, he had concluded that the April 15 lay-offs, including the lay-off of Mr. Ritrovato, were planned at an early morning meeting on the day of the lay-off, and were unrelated to any safety matters.

24. As a result of those conversations and his other efforts to investigate the circumstances of the complainant's lay-off, Mr. Palanuk concluded that although Mr. Ritrovato's suspicion that he had been laid off because of his safety activities was understandable, there was nothing available to prove that those suspicions were well founded. Mr. Palanuk was unable to find anything which could be used to refute the Company's plausible assertion that the decision to lay off Mr. Ritrovato and the other employees who were laid off on April 15, was made at approximately 9:30 a.m. that day, before Mr. Ritrovato advised management that he thought it was unsafe and illegal to back the rock truck across the aforementioned road without a flagman. Since he was unable to contact Mr. Ritrovato, Mr. Palanuk advised Mr. Redmond of his conclusion, and also told him what he had learned from Mr. Mazurski about the safety representative's lack of protection against lay-off due to shortage of work.

25. After completing his investigation concerning Mr. Ritrovato's April 15 lay-off, Mr. Palanuk telephoned Ernie Ford. After serving as a business representative for five years, Mr. Ford became the Union's Labour Relations Manager in 1977. Grievances which cannot be settled at the local level are generally sent to Mr. Ford's office in Toronto with a request that Mr. Ford proceed further with the grievance, or a request that Mr. Ford provide an opinion as to whether the Union should or should not proceed further. Mr. Ford is in frequent contact with the Union's 29 business representatives who work in various parts of the province. In making decisions concerning whether or not to arbitrate a grievance, Mr. Ford relies upon the information obtained through the business representative's investigation of the grievance. Mr. Ford does not generally speak with a grievor unless he decides to refer a grievance to arbitration, in which case he generally speaks with the grievor (or arranges for counsel to speak with the grievor if it is the type of case which he deems to require representation by counsel), in preparation for the arbitration hearing.

26. During that telephone conversation, Mr. Palanuk advised Mr. Ford that the complainant was of the view that he had been laid off by Pitts on April 15 because of his involvement in safety matters on the project. He explained to Mr. Ford that he had contacted the Ministry of Labour to discuss the matter and had subsequently been advised that the Ministry of Labour had investigated the matter and found that there was nothing to indicate that Mr. Ritrovato had been laid off as a result of his safety activities. Mr. Palanuk also told Mr. Ford that he had spoken with Pitts and had concluded that the lay-off was prompted by a shortage of work in that "the need for rock truck drivers at that time was just not there." Thus, Mr. Palanuk advised Mr. Ford that there was no evidence that Mr. Ritrovato's lay-off had anything to do with his involvement in safety matters on the project. He also noted that Pitts had not requested a replacement for Mr. Ritrovato. On the basis of that information, Mr. Ford told Mr. Palanuk that it appeared to him that the Union would have difficulty proceeding with a grievance or an *Occupational Health and Safety Act* complaint concerning Mr. Ritrovato's lay-off. In reaching that conclusion, Mr. Ford took into consideration the fact that Pitts would have the burden of establishing that the lay-off was not motivated by a desire to penalize or remove Mr. Ritrovato from the project because of his safety activities.

27. One of the witnesses called by the complainant in these proceedings was Paul Vesala, a member of the United Brotherhood of Carpenters and Joiners, Local 446 (referred to in this decision as the "Carpenters"). Mr. Vesala began working at the project in 1980 and was a health and safety representative (as well as a steward) from February to December of 1981, when he and all the other employees on the project were laid off for the Christmas break. It was his understanding that the person in that position represented the Ministry of Labour and would be the last person to be laid off. After working at some other jobs in early 1982, Mr. Vesala was recalled by Pitts, but was no longer the health and safety representative as someone else had replaced him in that position by that time. During the afternoon of Thursday April 22, 1982, Mr. Vesala and four other workers refused to return to a location approximately thirty feet below the ground, where they had been forming a manhole earlier that day. The reason for that refusal was their concern that it was unsafe to work there, as the warmth of the sun was thawing the ground and creating the danger of a cave-in. During the course of discussing the situation with them, the Carpenters' steward advised them that Mr. Ritrovato had been laid off.

28. Later that day, Mr. Vesala, who had been a friend of the complainant for several years, went to Mr. Ritrovato's apartment to tell him about that safety problem and to discuss his lay-off. During that conversation, Mr. Vesala told Mr. Ritrovato that the workers were very upset about his lay-off as they did not feel that the Company had the right to lay off their health and safety representative. Mr. Vesala, who was the first witness to testify in these proceedings, told the Board that he did not say anything to Mr. Ritrovato about a "wobble", and further stated, "I only found out about a wobble after I went home." However, that evidence was subsequently contradicted by Mr. Ritrovato, who testified that Mr. Vesala told him that "the carpenters and labourers were going to shut the job down the following day." Mr. Ritrovato further testified as follows concerning that matter: "I told him that I didn't want to get involved. He said, 'Well come by and see what's going on.' I said, 'I'll think about it.'" In response to further questions from his counsel, Mr. Ritrovato reasserted that he had told Mr. Vesala that he did not want to get involved, but revised his "I'll think about it" to "I might come down in the morning to see what's going on, just out of curiosity."

29. Mr. Ritrovato testified that someone whose voice he did not recognize telephoned him early the next morning and said, "We're going to wobble the job. Come on down and have a laugh." Mr. Ritrovato described himself as being "really groggy" that morning as a result of having been out very late the night before, and described his reaction to the call as follows: "I said to

myself, why not go see what's going on and I'll take in some fishing." It was his evidence that he "took up ice fishing after [he] got laid off" and "always kept [his] fishing gear in the car." Mr. Ritrovato also testified that he had previously arranged to meet a friend named John Persil later that morning to go ice fishing, but that they had not yet decided where to fish. After leaving a note for Mr. Persil, who was attending a class that morning, Mr. Ritrovato drove to the project.

30. On the morning of April 23, the blasters reported for work at their normal starting time of 7:00 a.m. However, most of the operating engineers, carpenters, electricians, labourers, and members of other trades scheduled to commence work at 8:00 a.m. did not report for work. As a result, the project was effectively shut down. After milling about one of the entrances to the project, they withdrew to a nearby parking lot. When Mr. Ritrovato arrived on the scene, he saw a large number of men standing there. He drove approximately 500 feet further and parked his car on the other side of the street in a location between the parking lot and the aforementioned entrance to the project. After sitting inside the car for a few minutes, he got out and leaned against the car for awhile before seating himself on its hood. He remained there until about 9:45 a.m. Mr. Ritrovato told the Board that while he was seated in that location, several people approached him, including a member of Local 793 who asked him if he was stopping anybody from going to work. Mr. Ritrovato testified that his response was: "No, I'm not in the middle of anything. Go to work. Don't get yourself into trouble because of me."

31. The complainant remained in that position until Mr. Persil arrived and suggested that they leave to go ice fishing at a friend's camp about 35 miles away. Mr. Ritrovato acknowledged that both Mr. Minderlein and Mr. Ackison saw him in that location between the parking lot and the project entrance. When the latter drove past him that morning, Mr. Ritrovato was leaning against his parked car. Mr. Ackison subsequently spoke with some of the employees who failed to report for work that day, and concluded that Mr. Ritrovato was the cause of the work stoppage. Mr. Ackison's testimony in that regard was as follows: "The work stoppage was set up so that when I came to work I recall Mr. Ritrovato leaning against his car. He had located himself between the employees in the parking lot and the main gate entrance. That required that any of the employees walk past him.... He was acting as a picket to deter them from coming to work." Mr. Ackison further testified that he was advised by a steward that Mr. Ritrovato's lay-off was the cause of the work stoppage. That conversation, together with conversations with other members of the bargaining unit and his personal observation of Mr. Ritrovato on the morning of the "wobble", led Mr. Ackison to conclude that Mr. Ritrovato was a principal participant in the work stoppage, and that the work stoppage "was due entirely to the lay-off of Mr. Ritrovato" and Mr. Ritrovato's "misconception about his lay-off".

32. While driving along a street in Sault Ste. Marie at approximately 8:00 a.m. on April 23, Mr. Palanuk observed Mr. Redmond driving along the same street. Since it was past Mr. Redmond's normal starting time at the project, Mr. Palanuk was somewhat surprised to see him there and, accordingly, asked him what he was doing. Mr. Redmond told him that there was a "wobble" at Pitts. He also told him that the workers were in the parking lot and that Mr. Ritrovato was standing near the gate. When Mr. Palanuk telephoned one of the Labourers' business agents at approximately 9:45 that morning to ask about the "wobble", he was told, "One of your members was standing at the gate this morning." (That evidence was received by the Board, over the objection of counsel for the complainant, on the basis that the respondent was entitled to adduce evidence concerning information obtained by Mr. Palanuk during the course of his investigation, not for the truth of its (hearsay) contents, but to show what was in Mr. Palanuk's mind concerning the merits of Mr. Ritrovato's concerns at the time.) Although the business agent did not name the member who was standing near the gate, on the basis of Mr. Redmond's earlier statement Mr. Palanuk concluded that it was Mr. Ritrovato. Later that day, Mr. Palanuk also spoke with a couple

of other members who told him that Mr. Ritrovato was there and was involved in the work stoppage, which came to an end when all of the workers returned to work on Monday April 26.

33. No one was recalled or referred to the project between the April 15 lay-off and the April 23 work stoppage. Three or four days after the “wobble”, Mr. Alberta was recalled to the project to work as an oiler, which is a “C body” job. In explaining Mr. Alberta’s recall pursuant to Article 3.1 of the Provincial Agreement, Mr. Ackison told the Board that when Pitts needed an additional worker, they would review the list of employees who had been laid off and, if possible, pick someone they knew for recall rather than have the Union refer a new worker to the project. He also told the Board that there was no possibility that Pitts would have requested that Mr. Ritrovato be referred back to the project at that time in view of “his role in the wobble”. Before deciding to recall Mr. Alberta to the project by requesting the Union to refer him as an oiler, Mr. Ackison spoke with a master mechanic on the project to obtain his impression of Mr. Alberta’s ability to work as an oiler using a grease gun to perform maintenance work on the machinery.

34. During the three-month period following his lay-off, Mr. Ritrovato obtained some part-time work with Permanent Concrete, a former employer. He did not advise Mr. Palanuk of his employment there as he wanted to return to Pitts where the wages were higher and the hours of work steadier. (Although that employer had a collective agreement with the Union, it was not required under the terms of that collective agreement to use the Union’s hiring hall, and did not do so.) While working for Permanent Concrete, Mr. Ritrovato encountered Mr. Palanuk on the project sometime in May. Since he had seen some “new faces” on the machinery, he asked Mr. Palanuk why he had not been referred back to the project. Mr. Palanuk’s response was that Mr. Ritrovato already had a job and that Pitts probably would not take him back because of the “wobble”. As Mr. Palanuk walked away, Mr. Ritrovato told him that his employment with Permanent Concrete was “only a day here and a day there.”

35. On July 18, 1982, Mr. Ritrovato sent to Mr. Kennedy the following (handwritten) letter of complaint concerning Mr. Palanuk:

I write this letter to you because we (793 soo) need a new B.A. George is a nice guy, but we need someone who will stand up for us. I was a steward and was asked to file grievances. I have not recieved [sic] any answer or help. Members have been dismissed from jobs for no reason. Our B.A. will replace the men with someone else. Our B.A. has let non union people work on union jobs. Well paid members have sat at home with no work. I as a member have not been helped by 739 [sic] B.A. I was laid off from Pitts because of shortage of work. Everyone was called back and new people sent, but I was not. The reasons are that I would not do anything that was unsafe. I was Safety Captain. The first time I was laid off from Pitts, they did not want me back because I wouldn’t back up without a flagman. I wasn’t the only person. I had to tell George that if I didn’t get back to work and the reason was because I would not back up without a flagman, I would go to department of labour. That night at 11:30 p.m. my B.A. called and sent me to Pitts. I was told in the morning by project manger [sic] that I was not liked by one of the foremun [sic]. The reason being that I would not back up without a flagman. We have a concrete plant that is union, but has hired non union people while union people sit at home. I would like to know how much longer the members of 793 soo have to put up with this treatment. The employer has it their own way. They know that our B.A. will not help the members to the full extent. The employer will get away with what they want. I as a member am fed up with all the garbage that is going on. I would like to know how much longer this is going to go on. The members are willing to stand up for their rights are going to be heard [sic].

36. When Mr. Ritrovato discovered that other members, including Mr. Alberta, had been referred to the project following the work stoppage, he attempted to reach Mr. Palanuk by telephone but was unable to do so as Mr. Palanuk was out of the office each time he called. He ultimately reached Mr. Palanuk on July 22 and again threatened to go to the Ministry of Labour. Mr. Palanuk’s response was: “Just wait. I’ll get back to you.” Later that day Mr. Palanuk called Mr.

Ritrovato and invited him to come to the Union office to obtain a clearance card referring him to a job running a loader at the project on the new afternoon shift (commencing at 5:30 p.m. that day) which Pitts had decided to add and for which Pitts had requested Mr. Palanuk to refer "a grade foreman, a loader, a dozer, and a packer". In referring Mr. Ritrovato to that job, Mr. Palanuk was hopeful that Pitts would "let bygones be bygones" and accept Mr. Ritrovato back onto the project. That second shift continued for approximately three weeks. After that, there were very few referrals to the project as it was nearing completion.

37. When the complainant reported to the project that afternoon, Mr. Ackison told him: "We don't want you here. You shut the job down. We're not going to hire you back." That prompted Mr. Ritrovato to ask permission to speak with Mr. Redmond. However, Mr. Ackison told him that he could not remain on the site as he was not an employee.

38. After leaving the site, Mr. Ritrovato attempted unsuccessfully to contact the Ontario Human Rights Commission and the Ministry of Labour. He also went to the Union office but it was closed by the time he got there. On the following day, after speaking with Mr. Hayes-Sheen, the complainant called the Union office and informed the secretary, who was the only one in the office at that time, that Pitts had refused to accept him. When Mr. Ritrovato spoke with Mr. Palanuk later that morning, he told Mr. Palanuk that he wanted to file a grievance against Pitts for refusing to accept his referral back to the project. He also advised Mr. Palanuk that the reason given by Mr. Ackison for refusing to accept him was that he had shut the job down in April. During that conversation, Mr. Ritrovato told Mr. Palanuk that he had not caused the "wobble" and was not involved in it. Mr. Palanuk did not then, or at any other time, advise Mr. Ritrovato of what he had been told by others about Mr. Ritrovato's involvement in the "wobble". When asked in cross-examination if it might not have been a fair thing to tell Mr. Ritrovato what the others had said and to invite him to respond to their version, Mr. Palanuk said: "There was only one version. [Mr. Ritrovato] was there. Other people told me he was there." He further testified (in cross-examination) as follows concerning Mr. Ritrovato's involvement in the "wobble": "The others said he was there at the gate. He had no sign or anything. He was just there at the gate.... I believe that when people saw him at the gate they wouldn't go in because of his lay-off. Whether he was stopping them or not I don't know.... [His] being there gave me the impression that he was involved with it.... Whether he was alone or with other people, I am not aware of.... Whether he was telling people not to go in I couldn't tell you...."

39. After speaking with Mr. Ritrovato, Mr. Palanuk called Mr. Ford and advised him of what had occurred. Mr. Ford suggested that Mr. Palanuk obtain from Pitts a letter specifying why they would not rehire Mr. Ritrovato.

40. Through a series of discussions with Mr. Ackison and R. Tanaka, who had replaced Mr. Minderlein as the Project Manager, Mr. Palanuk attempted to persuade management to accept Mr. Ritrovato back on the project. However, management remained steadfast in their refusal to rehire him because of their belief that he caused or was a principal participant in the April 23rd work stoppage. Mr. Palanuk requested that the Company provide a letter to that effect, but Pitts did not comply with that request.

41. As a result of letters of complaint from Mr. Ritrovato and several other members of the respondent, Mr. Kennedy sent Bruce Knight, an I.U.O.E. business representative in Sarnia, to Sault Ste. Marie to enquire into those complaints (and also to conduct a ratification vote concerning a memorandum of settlement with respect to the 1982-84 Provincial Agreement). When Mr. Knight arrived in Sault Ste. Marie on Tuesday afternoon, August 3, 1982, he telephoned David Selvers and arranged to meet with him the following evening. Mr. Selvers, who was called by the

complainant as a witness in these proceedings, was one of the persons who had written to Mr. Kennedy to complain about Mr. Palanuk. Mr. Selvers testified that he spoke to Mr. Palanuk about Mr. Ritrovato's grievance during the summer of 1982 and was told that the Union had to "keep the peace" with Pitts because it was in the midst of negotiating a deal with Pitts concerning the purchase from Pitts of a building in Toronto. (In actuality, that transaction took place in June of 1981, although Pitts was permitted to remain in the premises as a tenant for a period of time following the transaction.) However, I accept Mr. Palanuk's evidence that he did not in any way "go easy on Pitts" by reason of that purchase (nor for any other reason), and that he was "just joking" when he made that lighthearted statement to Mr. Selvers.

42. During his meeting with Mr. Knight, Mr. Selvers told him that one of the unresolved problems which required attention was a complaint by Mr. Ritrovato that Pitts had refused to rehire him when he was dispatched to the project by Mr. Palanuk on July 22. Mr. Selvers also told him that the reason for Pitts' refusal to rehire Mr. Ritrovato was that Pitts was blaming Mr. Ritrovato for the "wobble" that took place on April 23. When he later discussed the matter with Mr. Palanuk, Mr. Knight advised him to file a grievance about it as soon as possible "so that if Mr. Ritrovato had a legitimate beef, Local 793 [would be] representing him as per the collective agreement."

43. On August 4, in a further attempt to have Mr. Ritrovato rehired on the project, Mr. Palanuk "went over the heads" of Mr. Ackison and the other members of Pitts' management stationed in Sault Ste. Marie, by telephoning Dennis Flynn, a Pitts Vice-President who managed the Company's Human Resources Department. However, Mr. Flynn declined to overrule Mr. Ackison's decision to reject Mr. Ritrovato.

44. A special called meeting of the Union was held on Thursday evening August 5 to conduct a ratification vote concerning the Provincial Agreement, and to deal with any complaints or problems which the members had. Between 25 and 30 members attended that meeting. After the ratification portion of the meeting had concluded, Mr. Knight asked Mr. Palanuk to absent himself from the meeting. Following Mr. Palanuk's departure, Mr. Knight told the members that he was there to listen to their complaints, write them down, obtain Mr. Palanuk's response, and report to Mr. Kennedy, who would be responsible for determining what, if anything, should be done to remedy them. During the ensuing discussion, Mr. Ritrovato expressed dissatisfaction with Mr. Palanuk and the manner in which he had been handling the complainant's request that a grievance be filed. He also expressed the view that safety factors were involved in his lay-off. It was also noted that Pitts had refused to permit him to return to the project because Pitts was of the view that he had been an instigator of the "wobble". When Mr. Knight asked him if he had "wobbled the job", Mr. Ritrovato stated that he had not done so. Mr. Ritrovato told Mr. Knight that he felt his complaint had not been properly handled by Mr. Palanuk as no grievance had been filed on his behalf. Mr. Ritrovato threatened to retain a lawyer to assist him, but Mr. Knight told him that there was no need to bring in a lawyer as the matter would be rectified internally. He also suggested that Mr. Ritrovato go to the Union office the following day to see Mr. Palanuk and file a grievance.

45. When Mr. Knight met with Mr. Palanuk early the next morning to get his response to the complaints of various members including Mr. Ritrovato, Mr. Palanuk confirmed that Pitts had refused to rehire Mr. Ritrovato because management was of the view that Mr. Ritrovato had shut down the project on April 23. Mr. Knight repeated his earlier suggestion that Mr. Palanuk file a grievance and also suggested that if Pitts continued to refuse to rehire Mr. Ritrovato, a letter should be obtained from Pitts confirming that the reason was that Mr. Ritrovato had "wobbled the job". During that breakfast meeting, Mr. Palanuk requested and obtained Mr. Knight's suggestions about how the grievance should be phrased.

46. After meeting with Mr. Palanuk, Mr. Knight returned to Sarnia and subsequently sent to Mr. Kennedy a detailed report which read, in part, as follows:

As per your instructions, I travelled to Sault Ste. Marie to ratify the Memorandum of Agreement and check into complaints from the members in District #8. The membership turned down the Memorandum, by a 60 to 40 per cent margin.

Now, the major problem. First, a little background on the situation. We have a membership in the "Soo" who believe that they can run the Union. They believe that a wobble will solve everything and that if they are not militant, they will lose the respect of the Company and of other Trades. This attitude may come about because some of the members and George do not co-operate. But, I did not talk to any member who said he disliked George as a person.

I talked to Dave Selters, Larry Marconi and Don Redmond about any problems they've incurred. Also, after the ratification meeting, I had George leave and about twenty-five members stayed to "air their views". I listed their problems, then later, sat down with George and heard his response to these problems.

Following is a list of the members' complaints along with George's reply to each.

• • • •

Dave Selter's complaints were as follows

• • • •

Complaint -Angelo was laid off and not rehired when dispatched.

Geo's reply -The Company does not want him back; but he will file a grievance today. (i.e. Aug. 5/82)

• • • •

From the members at the meeting, these further complaints were heard:

• • • •

Complaint -Angelo Ritrivatto [sic] says he did not wobble the job. He is the Operator who was not hired when dispatched to the Pitts job.

Geo's reply -Angelo did wobble the job and Pitts won't hire him back. George is filing a grievance; getting letter from Pitts saying they won't hire Angelo.

• • • •

Now, my summation, which is, you realize, my own opinion. It appears that there is a barrier between some of the members and George which has been widening over the years. The members expect instant service and want the Business Representative to be their puppet. Of course, George will not do this and the members resent this. Perhaps George does not communicate enough with his Stewards and possibly keeps them "in the dark" as to what is going on. Also, George should appoint the Stewards and not allow the members to elect them, on the job. He has some Stewards who will not work closely with him. This in itself creates a problem.

George should file more written grievances and watch his time limits closer. At least the members will be happy that something concrete is being done to solve their problems. They feel he is trying to ignore their problems in hopes that they will disappear. This will help get their trust back. George should attempt to return the members calls as soon as possible after they call.

Also, George should sponsor some courses, i.e. Safety Representatives, First Aid, etc., to get some rapport between the members and himself. He should communicate closer with the mem-

bers and get them "on his side". He should also take charge at meetings and tell the members the way it is and not just try to appease them. It may be difficult for George to change his attitude, but I believe he can.

George should have more supervision to see that his duties are performed. It is my thoughts [sic] that perhaps Mike [Quinn] from Sudbury could help. He could just see that George follows up and doesn't let things get ignored. George seems to be a good worker but needs some direction and someone to answer to.

The members are concerned with the image of Local 793 and I think they could improve it by working with George.

In conclusion, all of the above is my own opinion. I told the members and George that I would write this report and give it to you. Also, I told them that a decision, if any, would be coming from you. If any decisions have to be made, would you please inform those concerned as this is one of the problems of being kept "in the dark".

If you require any further information or any clarification, please contact me.

47. In accordance with Mr. Knight's suggestion, Mr. Ritrovato went to the Union office on August 6 and met with Mr. Palanuk, who filled out a grievance form and handed it to Mr. Ritrovato for his comments. The grievance proposed by Mr. Palanuk pertained to Pitts' refusal to accept Mr. Ritrovato for employment pursuant to his July 22 referral. However, after looking it over, Mr. Ritrovato asked Mr. Palanuk to grieve Pitts' failure to take him back from the time at which it had started to recall rock truck drivers. Mr. Palanuk then checked the Union's hiring hall records to determine that date. At Mr. Palanuk's suggestion, Mr. Ritrovato signed three blank grievance forms on the understanding that Mr. Palanuk would have his secretary type onto those forms what had been written on the rough draft which they had been discussing. During that conversation, Mr. Palanuk asked Mr. Ritrovato about his role in the wobble. Mr. Ritrovato replied, "I had nothing to do with it."

48. At the next Union meeting, Mr. Palanuk invited Mr. Ritrovato to come to the Union office to get a copy of his typed grievance. However, Mr. Ritrovato did not do so at that time. The reason which he gave in his evidence before the Board concerning that matter was: "I figured the grievance was there. He's taking care of it. I just carried on looking for work and helping my Dad at the farm." When Mr. Ritrovato did go to the Union office some time later for that purpose, Mr. Palanuk's secretary told Mr. Ritrovato (in Mr. Palanuk's absence) that she did not have a copy of any grievance for him. That made Mr. Ritrovato quite angry and did little to inspire his confidence concerning the manner in which Mr. Palanuk was representing him.

49. The complainant did not see the typed grievance that was filed by Mr. Palanuk on his behalf until it was provided to his counsel during the course of these proceedings. It indicates "Article 4 - Management Rights" to be the section of the Provincial Agreement that has been violated, and specifies "May 17, 1982 and continuing" to be the "time period concerned". Article 4 provides, in part, as follows:

- 4.1 The Union agrees and acknowledges that the Employer has the exclusive right to manage the business and to exercise such right without restriction, save and except such prerogatives of management as may be specifically modified by the terms and conditions of this Agreement.

Without restricting the generality of the foregoing paragraph, it is the exclusive function of the Employer:

- a) To determine qualifications, classify, transfer, hire, direct, promote, demote, lay-off,

discipline and discharge employees for just cause and to increase and decrease working forces in accordance with the terms of this Agreement.

• • • •

- 4.2 The Employer recognizes that the employee and the Union have recourse through the grievance procedure if they feel that the Employer has exercised any of the foregoing rights contrary to the terms of the Agreement.

• • • •

Also included in the grievance is the following information:

The nature of the grievance is as follows:

That the Company disciplined the above named Employee unjustly on April 14th, 1982. Laid-off and refused to re-employ said Member of I.U.O.E. Local 793 that was dispatched by the Union Office on July 22nd., 1982.

Remedy Requested: That the Company remit wages and benefits from May 17th, 1982 and continuing and re-instate said Employee.

50. Mr. Palanuk delivered that grievance to Pitts on August 9, 1982. After reviewing the provisions of the Provincial Agreement concerning the time limits for filing grievances and consulting with Pitts' Manager of Human Resources, Mr. Ackison replied to the grievance on behalf of the Company by means of the following letter dated August 11, 1982, which was received by Mr. Palanuk on the following day:

The grievance filed on behalf of Mr. Angelo Ritrovato was in reference to actions of July 22, 1982. This grievance was not presented until August 9, 1982. Under article 6.5 and 6.7a of the collective agreement this grievance is untimely and no further action will be taken.

51. Article 6.5 of the applicable Provincial Agreement provided:

If advantage of the provisions of Articles 6 and 7 hereof is not taken within the time limits specified therein or as extended in writing as set out above, the grievance shall be deemed to have been abandoned and may not be re-opened.

Article 6.7(a) provided:

It is understood and agreed that an employee does not have a grievance until he has discussed the matter with his foreman or other supervisory personnel acting in this capacity and given him an opportunity to deal with the complaint. His decision shall be made known to said employee within forty-eight (48) hours. Grievances properly arising under this Agreement shall be adjusted and settled as follows:

STEP 1 - Within ten (10) full working days after the circumstances giving rise to the grievance occurred or originated, the aggrieved employee and/or a Union representative, shall present the grievance in writing to the official of the Employer named by the Employer to handle grievances at this step. If a settlement satisfactory to the Union and the employee concerned is not reached within two (2) full working days, the grievance may be presented as indicated in Step Two at any time within five (5) full working days thereafter or if the grievance involves monetary, discipline or discharge matters, not involving the interpretation of the Agreement to final and binding determination.

STEP 2 - At this step the grievance may be submitted to a local area Joint Committee consisting of representatives of the Union and representatives of the area Employer Association. Should no satisfactory settlement be reached within 5 working days of the grievance being submitted to the local area Joint Committee, the grievance may be presented as indicated in Step #3.

STEP 3 - At this step the grievance shall be referred to the Joint Labour Management Committee which shall convene a meeting within ten (10) full working days to deal with the grievance. Should no satisfactory settlement be reached within five (5) full working days after the meeting, the grievance may be submitted to arbitration.

52. Mr. Ackison told the Board that the reply was confined to the timeliness issue because that was “the most straightforward and difficult position for [the Union] to argue the grievance from”, and because “if it wasn’t timely there wasn’t much sense in getting into the merits”. However, he also testified that if the grievance had gone to arbitration, Pitts would have defended its refusal to re-employ Mr. Ritrovato on the basis of his role in the work stoppage.

53. Mr. Palanuk did not send a copy of Pitts’ reply to Mr. Ritrovato or otherwise advise him of the Company’s response. He acknowledged in his testimony before the Board that on the basis of what he has learned from these proceedings, he would now provide a grievor with a copy of the employer’s reply to his grievance.

54. After receiving the Company’s reply to the grievance, Mr. Palanuk telephoned Mr. Ford and read it to him. He told Mr. Ford that in his discussions with Pitts concerning the grievance, management had indicated to him that the reason they would not rehire Mr. Ritrovato was that they were of the opinion that Mr. Ritrovato was responsible for the work stoppage that had occurred on April 23. Mr. Palanuk also advised Mr. Ford that he had investigated the work stoppage in the spring by speaking to a number of persons on the job site. After telling Mr. Ford what those persons had said, Mr. Palanuk told Mr. Ford that he had concluded from those conversations that Mr. Ritrovato had acted as a “one-man picket line” and was either responsible for the work stoppage or at least deeply involved in it. Although Mr. Palanuk had no recollection of it at the time of the hearing, I accept Mr. Ford’s evidence that during the course of that conversation, Mr. Ford indicated to Mr. Palanuk that “timeliness was not a concern at all” because the Union could rely on section 124 of the Act (which permits a party to a collective agreement in the construction industry to refer a grievance to the Board for final and binding determination “[n]otwithstanding the grievance and arbitration provisions in a collective agreement”). However, on the basis of the information provided to him by Mr. Palanuk, Mr. Ford also indicated to Mr. Palanuk that the Union was not in a position to proceed with Mr. Ritrovato’s grievance as he (Mr. Ford) was of the opinion that the grievance would fail because Pitts had a legitimate reason for refusing to rehire Mr. Ritrovato, namely, his direct responsibility for the work stoppage or his deep involvement in it. In deciding not to proceed with Mr. Ritrovato’s grievance, Mr. Ford also took into account the fact that the Provincial Agreement did not provide for recall of employees by seniority (except in Schedule A, which applied only to employers in the crane and equipment rental business and was, accordingly, of no assistance regarding Mr. Ritrovato’s grievance). Mr. Ford was aware that the Company would have the burden of establishing just cause if the lay-off constituted disciplinary action as contended by Mr. Ritrovato. However, he was of the opinion that there was nothing about Mr. Ritrovato’s lay-off which suggested that it ought to be considered a disciplinary matter. In response to a question posed by Union counsel in re-examination, Mr. Ford told the Board that if he encountered a situation in which he felt that a business representative’s investigation of a grievance was inadequate he “would either get personally involved or instruct him as to what steps to take to further investigate.” He also told the Board that he did not find that to be necessary in respect of Mr. Ritrovato’s grievance as he felt that the information which he obtained from Mr. Palanuk was sufficient.

55. During examination in chief, Mr. Kennedy told the Board that a grievor who is unhappy with a decision by Mr. Ford not to arbitrate his grievance can appeal directly to him. He also stated that if he disagreed with the decision of Mr. Ford, he would overrule him. However, he further testified that if he had been contacted by Mr. Ritrovato and been advised that Mr. Ritro-

vato did not cause the “wobble”, he would not have overruled Mr. Ford as Mr. Kennedy was of the view that it did not make any difference whether Mr. Ritrovato caused the “wobble” or merely participated in it. He was not asked what his reaction would have been if he had been told that Mr. Ritrovato was not a participant but rather was merely an observer. During cross-examination concerning avenues of appeal that are available to members, Mr. Kennedy stated that he was one of the people to whom a member could appeal, but added that a member could also appeal to the Union’s Executive Board in Toronto and “to Washington”. However, Mr. Ritrovato was not advised of any of those avenues of appeal by Mr. Palanuk, Mr. Kennedy, or anyone else. Indeed, when Mr. Palanuk was asked (during cross-examination) if there was any avenue of appeal within the Union from a decision by the Labour Relations Department, he replied, “I don’t know.” His lack of knowledge in that regard was confirmed in re-examination concerning the Union’s appeal process; when counsel for the respondent asked him, “Do you know what a member of your Union would do if they were unhappy with your decision, Jack Redshaw’s decision, or Ernie Ford’s decision?” Mr. Palanuk replied, “No.”

56. Even after Mr. Ford had decided that Mr. Ritrovato’s grievance would not be pursued to arbitration, Mr. Palanuk continued to seek to have Mr. Ritrovato rehired by Pitts. He met with Mr. Tanaka to that end on August 24 but was not successful. During that meeting, Mr. Palanuk also repeated, to no avail, his request for a letter explaining the Company’s refusal to rehire Mr. Ritrovato. Although Mr. Palanuk was left with the impression that such a letter would be prepared, it was not forthcoming.

57. On August 26 Mr. Palanuk attempted to telephone Mr. Ritrovato at his apartment and at his parents’ home to report to him concerning his grievance. However, there was no answer at either number. A further attempt to contact Mr. Ritrovato by telephone on August 31 was also unsuccessful. Mr. Palanuk acknowledged in cross-examination that he probably should have informed Mr. Ritrovato by letter that the Union had decided not to proceed with his grievance.

58. At the time of these proceedings, Jack Redshaw had been a Local 793 business representative for approximately twenty years. In 1982 he was employed in the Union’s Labour Relations Department, and was also its Recording Secretary. He was assigned by Mr. Kennedy to go to Sault Ste. Marie to replace Mr. Palanuk during Mr. Palanuk’s vacation from mid September of 1982 until the end of that month. Mr. Kennedy also requested Mr. Redshaw to investigate members’ complaints about Mr. Palanuk while in Sault Ste. Marie, and to report back to Mr. Kennedy and to Frank Giles who, prior to his death in the spring of 1985, had been the President and Assistant Business Manager of Local 793 for a number of years. Some of those complaints had been sent to Mr. Kennedy in writing, while others had been made verbally over the telephone. One of the written complaints was Mr. Ritrovato’s letter of July 18, 1982 (quoted above). In commenting on the scope of his assignment, Mr. Redshaw told the Board, “I had pretty well free rein on what I wanted to do in the area. If there was something I felt should be straightened out, I could do it.”

59. After arriving in Sault Ste. Marie, Mr. Redshaw investigated each of the aforementioned complaints through telephone calls, visits to job sites, and conversations with members whom he invited to meet with him at the Union office. He wrote down what he found out from each person and later relayed that information to Mr. Giles. He telephoned Mr. Ritrovato and spoke with him about his written complaint. During that telephone conversation, Mr. Ritrovato, who was very agitated, expressed dissatisfaction with the manner in which Mr. Palanuk had handled his complaints about the April 15 lay-off and Pitts’ refusal to rehire him on July 22. (He also expressed dissatisfaction concerning the Union’s “ready-mix” contracts.) Mr. Redshaw’s investigation of Mr. Ritrovato’s complaint led him to conclude that there was nothing further that could be

done for him because, in the absence of any witnesses or other means of proving wrongdoing on the part of Pitts, Mr. Redshaw concluded "that it boiled down to his word against Pitts".

60. Mr. Redshaw's overall conclusion concerning the situation in Sault Ste. Marie was that Mr. Palanuk's basic fault was that he was "too soft" and "just too much of a good guy" who was "constantly trying to please everybody all the time." Mr. Redshaw felt that Mr. Palanuk "should have been more of a leader", and recommended to Mr. Giles that Mr. Palanuk be given more supervision. In that regard, Mr. Redshaw noted that Mr. Palanuk's Area Supervisor had retired and had not been replaced, leaving Mr. Palanuk "all alone" with "no one to go to on a day-to-day basis". Mr. Palanuk also recommended that Bill Baird, a business representative for Local 793 in Hamilton, be sent to Sault Ste. Marie to improve Mr. Palanuk's "record keeping" system concerning the out-of-work list, as he was of the view that the files used by Mr. Palanuk concerning job referrals, although readily understandable by Mr. Palanuk, would be somewhat confusing to another business representative called upon to use them in Mr. Palanuk's absence.

61. After Mr. Redshaw returned to Toronto and discussed the situation in Sault Ste. Marie with Mr. Kennedy and Mr. Giles, it was decided that Mr. Giles should go to Sault Ste. Marie and hold a special called meeting to "straighten everything out, calm everyone down, and get everything back on track." Prior to that meeting, Mr. Giles reviewed Mr. Knight's written report to Mr. Kennedy and, as noted above, also received a report from Mr. Redshaw concerning the situation in Sault Ste. Marie. Mr. Giles was also aware through a discussion with Mr. Kennedy that a grievance had been filed by Mr. Ritrovato on behalf of Mr. Palanuk, and that Mr. Ford had decided not to arbitrate it.

62. Mr. Ritrovato heard nothing more about his grievance until October 13, 1982, when he attended the special called meeting chaired by Mr. Giles. Mr. Ritrovato received notice of that meeting through the mail. At that meeting he angrily complained that his grievance had not been properly processed. When Mr. Giles asked Mr. Palanuk what had happened to Mr. Ritrovato's grievance, Mr. Palanuk replied, "I lost it." Mr. Giles then said, "What do you mean 'lost it' - lost it in the garbage can or what?" Mr. Palanuk replied, "I lost it due to timeliness." In the discussion which followed, Mr. Ritrovato advised Mr. Giles that he intended to retain a lawyer, and Mr. Giles told him, "Do what you have to do."

63. In his testimony before the Board, Mr. Palanuk acknowledged that his statement at that meeting that he had lost Mr. Ritrovato's grievance due to timeliness was not accurate. His explanation for making that statement was: "I said in the heat of the moment that we'd lost it, [that] it was untimely.... I think that because Ernie [Ford] said we shouldn't pursue it, I could say it was lost. We didn't pursue it. That's what I meant by that." He also told the Board that he did not intend to mislead anyone by that "fast answer".

64. In speaking with Mr. Giles after that meeting, Mr. Palanuk outlined what Mr. Ritrovato's grievance was about and told him that Mr. Ford had instructed him not to proceed any further with it. Mr. Giles listened to what Mr. Palanuk had to say but made no comment. After returning from Sault Ste. Marie, Mr. Giles reported to Mr. Kennedy concerning Mr. Ritrovato's grievance and the other complaints raised by various members. After summarizing what had occurred at the special called meeting, Mr. Giles told Mr. Kennedy that he had spoken to Mr. Ritrovato and to a number of other members. He also advised him that he had spoken to Pitts in an unsuccessful attempt to get Mr. Ritrovato back to work. He further indicated that his investigation concerning Mr. Ritrovato's grievance had led him to conclude that Mr. Ford had made the right decision in deciding not to refer Mr. Ritrovato's grievance to arbitration. Thus, it was Mr. Giles' recommendation that the respondent not proceed any further with Mr. Ritrovato's grievance. Mr. Kennedy

accepted that recommendation by Mr. Giles, who had 27 years of experience as a business representative and officer of the Union, and whose judgment on such matters was respected by Mr. Kennedy.

65. As noted above, Mr. Ritrovato has complained to the Board that the respondent has contravened sections 68 and 69 of the Act. However, in arguing the case before the Board, complainant's counsel did not press his complaint under section 69 regarding Mr. Palanuk's failure to communicate with Mr. Ritrovato concerning employment and Mr. Palanuk's alleged failure to call Mr. Ritrovato for employment in the order of the out-of-work list, as that aspect of the complaint is not sustainable on the evidence before the Board. The only instance of anyone below Mr. Ritrovato on the out-of-work list being referred to work ahead of Mr. Ritrovato involves a member named Orville Hotchkiss. Mr. Palanuk exercised his discretion in the operation of the hiring hall to refer Mr. Hotchkiss ahead of some other members, including Mr. Ritrovato, because Mr. Hotchkiss, who was on welfare, was in dire need of work, and was unable to return to his former position as a ready-mix truck driver due to the revocation of his driver's licence. As noted by the Board in *Luciano D'Alessandro*, [1985] OLRB Rep. Dec. 1708, at paragraph 11, "[i]n applying section 69 of the Act, the Board has recognized that the operation of a hiring hall is a complicated matter which undoubtedly must involve an element of discretion: see, for example, *Raphael A. Julien*, [1985] OLRB Rep. Apr. 537, and *Thomas Beck*, [1985] OLRB Rep. Jan. 14." In the circumstances of the present case, I am satisfied that the aforementioned referral of Mr. Hotchkiss constituted a valid exercise of such discretion, and did not involve any arbitrary, discriminatory, or bad faith action. Accordingly, the complaint is dismissed insofar as it pertains to alleged contraventions of section 69 of the Act in respect of the operation of the Union's hiring hall.

66. Counsel for the complainant contended that the respondent, through Mr. Palanuk and others in the Union's hierarchy, acted in an arbitrary manner in the representation of Mr. Ritrovato by "missing the point" concerning Mr. Ritrovato's complaint about his April 15 lay-off, by failing to confront him with the information which Mr. Palanuk obtained through his investigation of the "wobble" so as to give Mr. Ritrovato an opportunity to respond to it, by giving Mr. Ford inadequate and incomplete information concerning Mr. Ritrovato's grievance, by reducing to writing "precious little" of the information which was obtained in respect of Mr. Ritrovato's grievance, by failing to put to the Company the complainant's point of view concerning his lack of involvement in the "wobble", and by failing to tell Mr. Ritrovato "what was going on". With respect to the last point, he contended that the Union contravened section 68 by failing to tell Mr. Ritrovato that its Labour Relations Department had decided not to arbitrate his grievance, by misleading him concerning the disposition of his grievance, and by failing to advise him of the avenues of appeal that were available to him within the Union. Counsel also contended that the respondent, through Mr. Palanuk, had acted in bad faith by "going easy" on Pitts because of the Union's real estate transaction with Pitts. The complainant did not name Pitts as a respondent or as a "person ... that may be affected by the complaint", and does not seek to have his grievance referred to arbitration, but rather seeks compensation from Local 793, a declaration, a posting, and an award of costs.

67. Counsel for the respondent submitted that his client did not contravene sections 68 or 69 of the Act. Although he acknowledged that there had been a failure of communication, he contended that it did not amount to a violation of the Act or, alternatively, that it warranted no more than declaratory relief. In support of his contention that the Union represented Mr. Ritrovato fairly, counsel noted the numerous attempts Mr. Palanuk made to contact Mr. Ritrovato; Mr. Palanuk's contacts with the Ministry of Labour, other business representatives, the Company, and the Union's Labour Relations Department; the consideration given to the merits of Mr. Ritrovato's grievances by Mr. Ford and Mr. Giles; and the sending of Messrs. Knight, Redshaw, and Giles to

Sault Ste. Marie to investigate and attempt to resolve members' complaints. He argued that the conciliatory style adopted by Mr. Palanuk in attempting to persuade Pitts to re-employ Mr. Ritrovato was not violative of the Act, as it was an approach which would often be more successful than an adversarial stance. He contended that the Union's decision not to arbitrate Mr. Ritrovato's grievance was correct in view of Mr. Ritrovato's involvement in the unlawful work stoppage. It was also his position that Mr. Palanuk was not required to confront the complainant with what he learned from others about his involvement in the "wobble" as to do so might jeopardize his future dealings with Mr. Ritrovato. In the alternative, he submitted that even if it might have been preferable for Mr. Palanuk to have confronted Mr. Ritrovato with what he had learned from his investigation, his failure to do so was not a breach of section 68 or section 69 of the Act.

68. Respondent's counsel also submitted that if the Board found a contravention of the Act, neither a monetary award nor a posting would be warranted in the circumstances of this case because, at most, Mr. Ritrovato "lost an opportunity to lose at arbitration". Counsel reminded the Board of the complainant's delay in filing this complaint, and of the resulting prejudice to the Union. In that regard, he noted that Mr. Giles, who would have been one of Local 793's witnesses in these proceedings, passed away prior to the hearing of the merits. He contended that the only relief to be awarded in the event the complaint succeeded was a declaration. Counsel further contended, in the alternative, that the complainant had lost very little work in any event since the second shift to which he was referred on July 22 lasted for only a short time. Thus, he contended that the complainant would only have been entitled to a few days' wages in the unlikely event that his grievance succeeded concerning the Company's refusal to re-employ him on July 22. He also submitted that the Board should not depart from its normal practice of declining to award costs.

69. Counsel for the respondent further contended that section 68 of the Act is not available to Mr. Ritrovato in respect of the aforementioned grievance as Mr. Ritrovato was not an employee in a bargaining unit at the time of the events covered by the grievance. However, I find no merit in that argument in the circumstances of this case. The matters covered by this complaint include Mr. Ritrovato's contention that the Union acted arbitrarily in its representation of him regarding his lay-off by Pitts on April 15, 1982, as well as Pitts' refusal to accept him back as an employee on the project on July 22, 1982. The section 68 duty of fair representation clearly applies to the Union's representation of Mr. Ritrovato in respect of the first of those two events. If it did not, then a discharged (or laid off) employee would have no recourse against his union for arbitrary, discriminatory, or bad faith representation in respect of a grievance concerning his discharge or lay-off. I am satisfied that it also applies to the respondent's representation of the complainant in respect of the second event. Moreover, if section 68 were not applicable to that matter, I am of the view that section 69 would be: see, generally, *Maurice Berlinguette*, [1984] OLRB Rep. Apr. 568, and *John Bellenger*, [1984] OLRB Rep. Aug. 1039.

70. As indicated above, I have accepted Mr. Palanuk's evidence that he did not "go easy on Pitts" because of the Union's real estate transaction with that Company nor for any other reason. Accordingly, the complainant's allegation of bad faith is not supported by the evidence. There is also no evidence of discrimination in the instant case. Thus, the central issue in these proceedings is whether the Union has acted in a manner that is arbitrary in the representation of the complainant. In commenting on the scope of that term, the Board wrote, in part, as follows in *I.T.E. Industries Limited*, [1980] OLRB Rep. July 1001:

18. Bad faith, malice, discrimination, or subjective ill will are clearly proscribed and readily ascertainable; the real difficulty is to determine when a union's conduct may be properly regarded as "arbitrary" - bearing in mind that the union's affairs may be conducted by laymen with limited formal education, or elected officials who may have been chosen for qualities other than their legal training or understanding of parliamentary procedure. While the Legislature

undoubtedly sought to protect the employee from an abuse of the union's authority, I do not think it was intended that every miscalculation, honest mistake, or error in judgment would constitute a breach of a public statute. The standard to which a union must adhere was described in *Ford Motor Company Limited*, [1973] OLRB Rep. Oct. 519 as follows (at paragraph 40):

"40. In deciding whether a union has violated the Act the standards to be applied are important. We recognize that union affairs are conducted for the most part by laymen. In some situations there are experienced full time officials of a trade union who conduct the union affairs; in other situations, the union affairs are conducted by employees in their spare time, while in yet other situations employees may be given a limited amount of paid time by their employers to engage in trade union matters. This Board does not decide cases on the basis of whether a mistake may have been made or whether there was negligence, nor is the standard based on what this Board might have done in a particular situation after having had the leisure and time to reflect upon the merits. Rather, the standard must consider the persons who are performing the collective bargaining functions, the norms of the industrial community and the measures and solutions that have gained acceptance within that community; see *Fisher v. Pemberton et al.* 8 D.L.R. (3d) 521 at p. 546."

Similar views were expressed in *Re: Ontario Hydro Employees' Union - CUPE Local 1000 and Walter Prinesdomu*, [1975 OLRB Rep. May 444, at p. 462ff. In a long passage which canvassed the intended meaning of the word "arbitrary".

"In using the word arbitrary both the United States Supreme Court and the Legislature of this Province must have envisaged the duty constituting more than the simple castigation of subjective ill-will in that any other interpretation would render the use of this word superfluous. Thus, a well known rule of both statutory and contractual construction militates against the respondent's particular submissions in this regard. But where does this path lead? Some insight is gained from the *Vaca* case wherein Mr. Justice White juxtaposed the word arbitrary with the word "perfunctory" and observed that a trade union in a non arbitrary manner [must] make decisions as to the merits of particular grievances". It could be said that this description of the duty requires the exclusive bargaining agent to put "its mind" to the merits of a grievance and attempt to engage in a process of rational decision-making that cannot be branded as implausible or capricious.

26. This approach gives the word arbitrary some independent meaning beyond subjective ill-will, but, at the same time, it lacks any precise parameters and thus is extremely difficult to apply. Moreover, attempts at a more precise adumbration have to reconcile the apparent consensus that it is necessary to distinguish arbitrariness (whatever it means) from mere errors in judgment, mistakes, negligence and unbecoming laxness....

On the other hand we do not believe, at least at this time, that all mistakes and careless conduct by trade union officials fall outside the scope of section 60 [now section 68]. It may be difficult to elaborate the precise meaning of arbitrary representation in advance but, as noted above, the very use of the word suggests that some regulation of the quality of decision-making was intended. Accordingly at least flagrant errors in processing grievances - errors consistent with a "not caring" attitude - must be inconsistent with the duty of fair representation. An approach to a grievance may be wrong or a provision inadvertently overlooked and section 60 has no application. The duty is not designed to remedy these kinds of errors. But when the importance of the grievance is taken into account and the experience and identity of the decision-maker ascertained the Board may decide that a course of conduct is so implausible, so summary or so reckless to be unworthy of protection. Such circumstances cannot and should not be distinguished from a blind refusal to consider the complaint. However, each case must be decided on its own peculiar facts and it is clear that the duty is not going to be a fertile field for the individual adversely affected by less flagrant conduct.

19. It is clear that in order to establish a breach of section 60, a complainant must do more than demonstrate an honest mistake or even negligence. The union must have committed a "flagrant

error” consistent with a “non caring attitude”, or have acted in a manner that is “implausible” or “so reckless as to be unworthy of protection”. In other words, the trade union’s conduct must be so unreasonable, capricious, or grossly negligent, that the Board can conclude that the union simply did not give sufficient consideration to the individual employee’s concerns. Honest mistakes or innocent misunderstandings are clearly beyond these parameters and do not attract liability.

71. See also *Savage Shoes Ltd.*, [1983] OLRB Rep. Dec. 2067, at paragraphs 36 to 39:

36. Section 68 requires that each trade union decision be grounded on a consideration of relevant matters, free from the influence of irrelevant considerations. The requirement that a trade union not act in a manner which is in bad faith protects the legitimate expectation that an individual employee’s bargaining agent will act honestly and free of any personal animosity toward him. The requirement that a trade union not act in a discriminatory manner protects against the making of distinctions between employees and groups of employees on bases which have no relevance to legitimate collective bargaining concerns. “Bad faith” and “discriminatory”, therefore, test for the presence, in the process or results of union decision-making, of factors which should not be present. “Arbitrary”, on the other hand, describes the absence in decision-making of those things which should be present. A decision will be arbitrary if it is not the result of a process of reasoning applied to relevant considerations. The duty not to act arbitrarily requires a trade union to turn its mind to the matter at hand.

37. Although this duty is imposed on the trade union as an institution, the trade union observes or breaches the duty through the actions of its officials or decision-making bodies. Especially where an impugned decision is that of a single official, there are obvious difficulties in reviewing the process by which that decision was made. Only the union official knows what his thought processes were and what facts and circumstances he actually took into account in the course of arriving at his decision. His ability to recall and articulate what took place in his mind may be influenced, sub-consciously or otherwise, by self-interest and by the knowledge that he is the only witness to these crucial mental events.

38. With [this] thinking process hidden from direct examination, a review of the behaviour of a trade union official must necessarily focus on what he did and the context in which he did it, as well as on what he says he thought. The result of the decision-making process is weighed against the facts and circumstances on which it is said to have operated. If the resulting interpretation of facts or of a collective agreement is found by the Board to be “reasonable” (*Clifford Renaud*, [1976] OLRB Rep. Jan. 967, 22; *Jay Sussman*, [1976] OLRB Rep. July 349 11; *I.T.E. Industries Limited* [1980] OLRB Rep. July 1001, 20), “not unreasonable” (*Ivan Pletikos* [1977] OLRB Rep. November 776, 3), “not open to challenge” (*Oil, Chemical & Automic Workers International Union and its Local 9-698*, [1972] OLRB Rep. May 521, 3), or at least “not implausible” (*Canadian Union of Public Employees Local 1000 - Ontario Hydro Employees Union*, [1975] OLRB Rep. May 444, 32), then the Board is inclined to find that the decision is not arbitrary. Where the decision maker, on the other hand, misapprehends facts and circumstances which the Board considers “patent” and arrives at an “almost perverse” understanding of the facts and circumstances, the Board will conclude that union effectively barred itself from “directing its mind to the real question”, and that in so doing it has acted in an arbitrary fashion: *The Corporation of the County of Hastings*, [1976] OLRB Rep. November 1072, 22. Where it is difficult to see a rational pathway between the facts and circumstances said to have been taken into account and the interests said to have been balanced on the one hand, and the result on the other, then there arises a rebuttable presumption that the decision was arbitrary.

39. The required thought process may involve more than the simple application of logic to the information then at hand. Decision making may be arbitrary if, before making its decision, the union fails to identify and seek out sources of further relevant information which should be taken into account in making that decision: *Canadian Union of Public Employees Local 2327*, [1981] OLRB Rep. June 623, 30; *Swing Stage Ltd. re Alvin Plummer*, [1983] OLRB Rep. Nov. 1920.

72. Several of the matters of which Mr. Ritrovato complains fall within the realm of the discretion or judgment which can legitimately be exercised by a union official in representing an

employee. For example, the fact that Mr. Palanuk did not make detailed notes of his conversations with the complainant, members of management, or other persons, does not, by itself, warrant a finding that section 68 has been breached. Although union representatives may well find it helpful to prepare notes concerning their investigation and processing of grievances, decisions about such matters should, for the most part, be left to the individuals involved, and should not generally be imposed by the Board. The same is true of the “conciliatory” approach adopted by Mr. Palanuk in his attempts to persuade the Company to accept Mr. Ritrovato back onto the project. Whether a conciliatory approach is more likely to be fruitful than an adversarial approach in particular circumstances is a matter of judgment on which reasonable persons may well differ. It would be an unwarranted and inappropriate extension of section 68 for the Board to “second guess” a business representative or other union official on such a matter in circumstances such as those disclosed by the evidence in this case.

73. I am also satisfied on the totality of the evidence that Mr. Palanuk did not “miss the point” concerning Mr. Ritrovato’s complaint about his April 15 lay-off. It is true that Mr. Palanuk devoted considerable time and energy to determining if there was anything in the *Occupational Health and Safety Act*, or the regulations made pursuant to that legislation, which would preclude the Company from laying off a health and safety representative while other employees remained at work. However, he also went to the project to investigate the validity of Mr. Ritrovato’s suspicion (relayed to him by Mr. Ritrovato’s steward, Mr. Redmond) that Mr. Ritrovato had been laid off because of his involvement in safety matters. After reviewing the Company’s documentation and discussing the matter with Mr. Ritrovato, Mr. Redmond, Mr. Minderlein, Mr. Ackison, officials of the Ministry of Labour, and others, Mr. Palanuk concluded, not unreasonably, that the Union would be unable to effectively counter the Company’s position that the decision to lay off Mr. Ritrovato, Mr. Alberta, and certain other workers, was made at an early morning meeting on the day of the lay-off, prior to Mr. Ritrovato’s refusal to back across the Parks Canada Roadway without a flagman, and that the decision was unrelated to any safety matters. His judgment in that regard was confirmed by Mr. Ford, an experienced Union official who has been the respondent’s Labour Relations Manager since 1977.

74. There are, however, a number of troubling aspects about the manner in which Mr. Ritrovato was represented by the respondent in respect of his grievance concerning the Company’s refusal to accept him back onto the project on July 22, 1982. As indicated above, on the day of the work stoppage for which the Company held Mr. Ritrovato responsible, Mr. Palanuk was advised by Mr. Redmond that the workers were in the parking lot and that Mr. Ritrovato was standing near the gate. Mr. Palanuk also spoke with one of the Labourers’ business agents that morning and was told that one of Local 793’s members (whom Mr. Palanuk assumed to have been Mr. Ritrovato) had been standing at the gate that morning. Mr. Palanuk failed to advise the complainant of what those persons had told him, even though he had ample opportunity to do so during their telephone conversation on July 23, in which the complainant told Mr. Palanuk that he had not caused the “wobble” and was not involved in it. Moreover, after speaking with Mr. Ackison, who confirmed that Pitts did not want Mr. Ritrovato back on the project because management was of the view that Mr. Ritrovato had been the principal participant in the work stoppage, Mr. Palanuk did not advise Mr. Ritrovato of the information he had obtained concerning Mr. Ritrovato’s involvement in the work stoppage through his conversations with Mr. Ackison, and the foregoing conversations with Mr. Redmond and the Labourers’ business representative. Thus, Mr. Palanuk failed to give Mr. Ritrovato an opportunity to respond to the damaging information which he obtained from them. As a result, Mr. Palanuk was not in a position to advise the Company or Mr. Ford of Mr. Ritrovato’s version of the events in question.

75. In paragraph 14 of *Jean Lieberman*, [1986] OLRB Rep. June 753, the Board, after

reviewing its evolving jurisprudence under section 68, indicated that as a general proposition, it can be said that a union will breach section 68 if it fails to take reasonable steps to ascertain from its grievor, or to afford him or her an opportunity to discuss with it, his or her reason or explanation of events and circumstances which, if not contradicted or satisfactorily explained, would lead the union to act against the grievor's interest with respect to the grievance. (See also *Swing Stage Ltd.*, [1983] OLRB Rep. Nov. 1920, and *Jeanne St. Pierre*, [1986] OLRB Rep. June 883.) The Board noted in the *Liebman* case that "[l]ike any other general statement of principle, this one will be found to have its limits and exceptions." However, I am satisfied that the facts of the present case, like those in the *Liebman* case, "fall squarely within the ambit of this important principle, whatever form of words might be chosen to state and delimit it." Thus, I am satisfied that the respondent, through Mr. Palanuk, contravened section 68 of the Act by failing to take reasonable steps to afford Mr. Ritrovato an opportunity to state and discuss his version or explanation of his presence at the wobble, and to contradict the information that Mr. Palanuk received from others, which led him to conclude that Mr. Ritrovato had been a "one-man picket line." That failure was not corrected by Mr. Knight, Mr. Redshaw, Mr. Giles, or any other Union official. Although they listened to Mr. Ritrovato's concerns, they did not advise him of the information which had led the Union to conclude that his grievance would not succeed. Thus, he remained "in the dark" concerning that crucial information, and was never given an opportunity (prior to the hearing of this complaint) to contradict it or satisfactorily explain it by, for example, alerting the Union to the role which Mr. Vesala and the other aforementioned carpenters played in the work stoppage.

76. The fact that no one from the Union advised Mr. Ritrovato that Pitts had rejected his grievance on the grounds that it was untimely and, even more importantly, that the Union had decided not to proceed any further with his grievance, also evidences arbitrariness. Although the complainant was sometimes difficult to reach by telephone, no satisfactory explanation was offered for the Union's failure to even attempt to communicate with him by mail regarding those important matters. Thus, although Mr. Ford decided in August that the respondent would not proceed any further with Mr. Ritrovato's grievance, Mr. Ritrovato was not informed of that decision. Furthermore, at the special called meeting held on October 13, 1982, the Union, through Mr. Palanuk, misinformed the complainant about the disposition of his grievance, by indicating that the grievance had been "lost due to timeliness". That misinformation was given to Mr. Ritrovato by Mr. Palanuk despite the fact that Mr. Ford had advised Mr. Palanuk that timeliness was not a problem, in view of the availability of section 124. Moreover, neither Mr. Palanuk nor any other Union official took any steps to correct that misinformation prior to the parties' legal representatives' exchange of correspondence which preceded the filing of this complaint (as described in the aforementioned decision dated May 21, 1985 in this matter).

77. In view of the foregoing findings of arbitrariness violative of section 68, it is unnecessary to determine whether the respondent further contravened that provision of the Act by failing to inform Mr. Ritrovato of the internal appeal rights that were available to him, as contended by counsel for the complainant.

78. Having found that the respondent has contravened section 68 in the manner described above, I must now determine what is the appropriate remedial response. As noted above, the complainant does not seek to have his grievance referred to arbitration, but rather seeks a declaration, a posting, and compensation from the Union. Counsel for the complainant also requested an award of costs. In rejecting a similar request by a complainant in *Silknit Limited*, [1983] OLRB Rep. Nov. 1913, the Board wrote in part, as follows:

8. We are not entirely unsympathetic to the complainant's concern, for we recognize that a party may well have to expend substantial sums in connection with proceedings under the *Labour Relations Act*. Moreover, there is something to be said for the argument that if one can obtain

costs upon the vindication of private law rights, the measure of compensation for the successful assertion of public rights guaranteed by statute should be no less generous. However, there are a number of difficulties with this superficially attractive proposition. In the first place, costs are not dealt with explicitly in the statute, with the result that it is arguable that the Board has no jurisdiction to award costs except as a part of the compensation award flowing from a finding of a statutory violation. Thus, there may be no authority to compensate a party respondent which has successfully resisted or defended against a claim. And how should one deal with a situation in which, from a practical or legal stand point, success is divided? The law of costs in the civil process is both technical and complex, and there are good policy reasons why it should not be readily imported into a law of collective bargaining which has survived without it for forty years and which the laymen who operate within the system and regularly appear before the Board have some difficulty understanding as it is. Finally, while it is tempting to suggest that flagrant or egregious violations of the statute should result in a "make whole" remedy in which the aggrieved party is compensated for the costs of the proceeding, it is much less clear how one would distinguish an "ordinary" violation of the statute from a "flagrant" one or a frivolous assertion from one which is arguable but ultimately rejected. It is one thing to suggest that a serious breach of the *Labour Relations Act* may trigger special remedial considerations or call for ingenuity in fashioning the appropriate remedy; it is quite another to suggest that an "ordinary" breach of the Act yields one level of compensation while a "serious" one warrants a higher level of compensation. Such an approach would begin to look "penal" rather than "compensatory" (and see sections 96 - 99 of the Act which are expressly penal in character).

That case involved a successful complaint by a trade union against an employer. However, similar requests have also been uniformly denied in the context of section 89 complaints in which the Board has found a trade union to have violated section 68 or section 69 of the Act: see, for example, *Joan Liebman, supra*, and *Gerald Lecuyer*, [1985] OLRB Rep. July 1099. I see no reason to depart from that approach in the circumstances of the present case.

79. The complainant is clearly entitled to a declaration that the respondent has contravened section 68 of the Act. A posting is also appropriate to advise other members of the Union of the Board's disposition of this case, and to assure them that the contraventions of the Act will not be repeated. But is the complainant entitled to a compensation order? In *Gerald Lecuyer, supra*, the Board traced the evolution of its remedial responses to contraventions of the duty imposed by section 68. As noted in paragraph 69 of that decision, "[a]t first, the Board regarded a monetary award against the union as its primary, if not only, remedial response to breach of that duty." However, in cases involving a union's refusal to process or arbitrate a grievance, that approach has for the most part been displaced by the remedy of directing the union to refer the grievance to arbitration. (See, for example, the twelve decisions cited in paragraph 76 of the *Lecuyer* decision.) Since that remedy directly affects not only the union which has refused to process or arbitrate the grievance, but also the employer which will be the other party in the arbitration proceedings, it can probably be awarded only in cases in which the employer has been notified of the proceedings and has had an opportunity to take part in them as a respondent or an intervener. No such notice was given in the instant case because, as noted above, the complainant did not name Pitts as a respondent or as a "person ... that may be affected by the complaint" (see paragraph 3 of the Board's Form 58). The fact that Mr. Ackison testified before the Board on the fifth day of hearing of this matter does not cure that lack of notice. He was present solely as a witness summoned to testify by the Union as part of its defence to this complaint, and not as a representative of a party to the proceedings. Moreover, this is not, in any event, an appropriate case in which to direct that Mr. Ritrovato's grievance be referred to arbitration at this late date. The events which gave rise to the grievance occurred over four years ago and the project on which they occurred was completed long ago. The persons who would likely be called to testify in such proceedings have been widely dispersed and would no doubt find it difficult to recall the events in question with any real degree of precision at a future arbitration hearing. Thus, I am not inclined to direct that the complainant's grievance

ance be referred to arbitration in the circumstances of this case, even if I have jurisdiction to do so in these proceedings in the absence of notice to Pitts.

80. In *Radio Shack*, [1979] OLRB Rep. Dec. 1220, (application for judicial review dismissed in *Re Tandy Electronics Ltd. and United Steelworkers of America et al.* (1980), 115 O.L.R. (3d) 197), the Board, after reviewing a number of judicial and administrative authorities concerning damages for “loss of an opportunity”, concluded that it had jurisdiction to award such damages under section 89 of the Act. The case involved, among other things, an employer’s breach of its duty to bargain in good faith. Mr. Chercover acknowledged in his able submissions on behalf of Local 793 that, in an appropriate case, it might be open to the Board to award compensation to a complainant for loss of an opportunity to have his grievance arbitrated. However, he contended that the facts do not justify such an award in the instant case as, in his submission, the most that has been lost by Mr. Ritrovato is an opportunity to lose at arbitration. While it is certainly possible that the grievance would not have been successful at arbitration, the prospects of success are not so remote as to justify a conclusion that the complainant has suffered no loss whatsoever as a result of the respondent’s contraventions of the Act. This decision should not, however, be interpreted as indicating that the Board intends to abandon its well-established approach of using a direction to arbitrate as its primary remedial response to contraventions of section 68 involving refusals to process or arbitrate grievances. If, as will likely be the situation in most cases, that appears to be the appropriate remedy, a complainant will not be able to obtain compensation from the union (or the employer) without the necessity of having to first succeed at arbitration. Moreover, in those few unusual cases in which the Board finds that not to be an appropriate remedy and decides to award compensation for a loss of opportunity, the uncertain prospects of the grievance’s success at arbitration may well be a factor which significantly reduces the amount of compensation payable to a complainant. Thus, a complainant will not be permitted to obtain a financial advantage by failing to name the employer as a respondent or as a person that may be affected by a complaint involving a refusal to process or arbitrate a grievance.

81. In cases in which the Board directs that compensation be paid by a respondent to a complainant for a contravention of the Act, it is the Board’s general practice to deal only with the question of liability, and to remain seized of the complaint for the purpose of quantifying the complainant’s loss in the event that the parties are unable to agree on that matter. (See, for example, *Holiday Juice Ltd.*, [1984] OLRB Rep. Oct. 1449.) I propose to follow that established practice in the instant case. However, in view of the fact that much evidence and argument relevant to that issue has already been presented in these protracted proceedings, I find it appropriate in the circumstances of this case to provide the parties with some initial guidance concerning that matter, with the hope that further litigation costs to the complainant and the respondent can thereby be avoided.

82. In determining the value of the complainant’s loss of opportunity, a number of factors should be considered. If Mr. Palanuk had advised Mr. Ritrovato of the information which he had received from other persons concerning Mr. Ritrovato’s involvement in the work stoppage, had obtained Mr. Ritrovato’s response, and had relayed all of that information to Mr. Ford, it is possible that the Union’s Labour Relations Department might still have decided that the chances of success were too limited to justify the cost of referring the grievance to arbitration, and it is by no means certain that an appeal from such a decision would have overturned it. If the grievance had been referred to arbitration, it is also possible that it would not have succeeded. Although it appears that the workers had already decided to “wobble the job” before Mr. Ritrovato arrived on the scene and positioned himself between them at the entrance to the project, an arbitrator might well conclude that Mr. Ritrovato’s presence in that location also contributed to the work stoppage. Moreover, as noted by counsel for the respondent, there has been some recognition in the arbitral

jurisprudence that although an employer's refusal to hire (or rehire) an individual referred pursuant to a hiring hall provision in a collective agreement may be subject to arbitral review, it will generally not attract the degree of arbitral scrutiny which applies to discharge and discipline cases governed by a "just cause" clause: see, for example, *Ontario Hydro*, [1983] OLRB Rep. Jan. 99, and the cases cited in that decision. The fact that there was little, if any, need for rock truck drivers on the project by the fall of 1982 may also be of some relevance in determining the value of the complainant's lost opportunity. Furthermore, as noted above, Pitts had a discretion under the provisions of the Provincial Agreement to recall through the Union office former regular employees who had been absent for up to six months. Thus, it is not self-evident that Mr. Ritrovato would have been the first such person to be recalled even if he was completely blameless concerning the work stoppage. Indeed, the fact that he had only performed rock truck and payloader work for the Company, whereas other members of the Union had performed a greater diversity of work, would have made him a less attractive candidate for recall than some of his fellow workers. Under the circumstances, it appears to me that if the complainant's grievance had been referred to arbitration and had been found to have some merit, it is improbable that the complainant would have been awarded compensation by an arbitrator for the period prior to July 22 when he was referred to the project at the commencement of the second shift which was added by the Company on that date. Moreover, it is probable that the complainant would, in any event, have been laid off approximately three weeks later when that second shift came to an end. His wage rate for hours worked during that period would have been \$13.23 per hour, plus vacation pay of \$1.32 per hour. The complainant's delay in filing this complaint is also an important factor to be taken into account in assessing the quantum of compensation to be awarded.

83. The amount of compensation payable to the complainant for his loss of opportunity cannot be calculated with mathematical precision. However, having regard to foregoing factors and to all of the evidence and submissions of the parties, it appears to me that the equivalent of approximately one week's pay would probably constitute proper compensation for the complainant's loss of opportunity in the circumstances of this case.

84. For the foregoing reasons, the Board hereby declares that the respondent has contravened section 68 of the *Labour Relations Act* and, pursuant to section 89 of the Act, hereby orders that:

- (1) the respondent compensate the complainant for the loss of opportunity described in this decision; and
- (2) that the respondent post forthwith a copy of the attached notice marked "Appendix", duly signed by a representative of the respondent, in a conspicuous place at its office in Sault Ste. Marie; keep the notice posted for sixty consecutive working days; and take reasonable steps to ensure that the notice is not altered, defaced, or covered by other material.

85. The Board will remain seized of this matter for the purpose of dealing with any dispute that may arise concerning the implementation or quantification of the Board's order.

Appendix

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE, INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793, HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH WE PARTICIPATED. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED SECTION 68 OF THE LABOUR RELATIONS ACT IN OUR REPRESENTATION OF ANGELO RITROVATO IN REGARD TO HIS GRIEVANCE CONCERNING THE REFUSAL BY PITTS ATLANTIC CONSTRUCTION LIMITED TO ACCEPT HIS REFERRAL BACK TO THE GREAT LAKES POWER PROJECT ON JULY 22, 1982.

THE ACT GIVES EMPLOYEES THE RIGHT TO BE REPRESENTED BY THEIR TRADE UNION IN A MANNER THAT IS NOT ARBITRARY, DISCRIMINATORY OR IN BAD FAITH.

WE ASSURE ALL EMPLOYEES REPRESENTED BY INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 THAT:

WE WILL NOT ENGAGE IN ANY CONDUCT THAT IS ARBITRARY, DISCRIMINATORY OR IN BAD FAITH IN THE REPRESENTATION OF ANY PERSON FOR WHOM WE HOLD BARGAINING RIGHTS;

WE WILL FORTHWITH COMPENSATE MR. RITROVATO FOR THE LOSS OF OPPORTUNITY WHICH THE BOARD FOUND TO HAVE BEEN SUFFERED BY HIM AS A RESULT OF OUR CONTRAVENTION OF THE ACT.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793

PER: _____
(AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

2396-85-U Don Roe, Dave Noble, Dan Dailey, Dale Smythe and Gary Crack, Complainants, v. United Steelworkers of America on behalf of Local Union 5595, Respondent

Duty of Fair Representation - Unfair Labour Practice - Union's grievance committee refusing to process layoff grievances - Majority of union members voting at meeting in favour of grievances being processed - Likelihood of success at arbitration and results of vote not exclusive relevant labour relations considerations - No indication of distinctions in treatment constituting discrimination

BEFORE: *Ian C. Springate*, Alternate Chairman.

APPEARANCES: *Gerald Bouchard, Terry Davey, Don Roe, Dave Noble, Dale Smythe and Gary Crack* for the complainants; *Michael Gottheil, Les Woodcock and Cyril White* for the respondents.

DECISION OF THE BOARD; October 9, 1986

1. The names of the complainants appearing in the style of cause of this complaint are amended to read: "Don Roe, Dave Noble, Dan Dailey, Dale Smythe and Gary Crack". The name of the respondent is amended to read: "United Steelworkers of America on behalf of Local Union 5595".

2. This is a complaint under section 68 of the *Labour Relations Act*, which provides as follows:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

3. The parties filed with the Board an agreed statement of fact with respect to certain matters not in dispute. Both parties also called evidence to supplement the agreed statement of fact.

4. At all relevant times the respondent trade union represented employees of the Tube Division of The Algoma Steel Corporation, Limited in Sault Ste. Marie. The complainants, who were laid off by the company, object to the fact that the grievance committee of the union refused to process grievances related to their layoffs. The result of such grievances, if successful, would have been the reinstatement of the complainants and the layoff of certain other, more senior, employees. The union's grievance committee continued to refuse to process the grievances notwithstanding the fact that a majority of union members attending a membership meeting voted in favour of the grievances being processed to arbitration.

5. The events giving rise to these proceedings commenced in June 1985. At that time, the company had openings for five or six employees as tester crewmen. The collective agreement binding on the company required that the vacancies be posted for five days, and that preference for the positions be given to senior employees capable of performing the work. The company did not, however, post the vacancies. Had the company done so, it is possible, although far from certain, that Mr. Randy Brooks and certain other employees (the "Brooks group") would have applied for the positions. It appears to be common ground that if members of the Brooks group had applied and other more senior employees had not, they would have been awarded the jobs. As it was, the Brooks group did not know of the openings and did not apply. The company placed more junior

employees in the vacancies. It appears that at least some of these junior employees were newly hired to fill the vacancies. In October of 1985 the company laid off the Brooks group. If the Brooks group had been working as tester crewmen, they would not have been laid off.

6. On or about October 24, 1985 Mr. Brooks complained to Cyril White, the President of Local 5595, about the fact that he was being laid off while more junior employees continued to be employed as tester crewmen. Mr. White replied that the collective agreement permitted such a result if the junior employees had been promoted into the tester crewmen positions as a result of a job posting. Mr. Brooks advised Mr. White that there had not, in fact, been such a job posting. Mr. White then contacted Dave James, the company's employee relations officer. Mr. James confirmed that the tester crewman position had not been posted. Mr. White asked that the company now post the positions. The company did so. The Brooks group went into the plant and applied for the positions. The company awarded the Brooks group the positions without even waiting for the expiry of the five-day posting period under the collective agreement. It appears that no one else applied for the positions in response to the posting. With the return to work of the Brooks group, the more junior employees who had become tester crewmen in June were laid off. It is these laid-off junior employees who are the complainants in these proceedings.

7. On or about October 25, 1985 Mr. White was telephoned by Mr. Paul McLean, a steward who works on the tester line, and by Mr. Gerry Bouchard, the then chairman of the Local's grievance committee. Both Mr. McLean and Mr. Bouchard took the position that the complainants had become "established" in the tester crewmen positions and hence could not be replaced by more senior employees. Mr. White then telephoned Mr. John Dunlop, a general foreman, and suggested that the company reverse the situation back to what it had been previously. Mr. Dunlop replied that he did not have the authority to make such a change. On October 28, 1985, the issue was raised by the Local union's executive when meeting representatives of the company's employee relations department on another matter. The Local's executive suggested that the company's action in laying off the complainants and awarding the tester crewmen positions to the Brooks group might have been in error. The company's representatives denied that such was the case. The company explained that it had violated the collective agreement in June by failing to post the tester crewmen vacancies, and that the new posting was the only way to correct the violation. The Local's executive then agreed that the company's position was, in fact, correct.

8. It was not the Local's executive that actually decided on the processing of grievances. Rather, this was left to a grievance committee. The grievance committee met on October 30, 1985. It appears that at the time only one of the complainants had actually filed a grievance with respect to his layoff. However, the matter was considered by the committee on the basis that the other complainants would file grievances if the decision of the grievance committee favoured them. Mr. Bouchard, who earlier had advanced the complainants' position in his discussions with Mr. White, chaired the grievance committee meeting. This was the last grievance committee meeting attended by Mr. Bouchard as a result of his having earlier submitted his resignation from the committee. Mr. Fred Schmitt, the incoming grievance committee chairman, was also present and participated in the meeting. The situation concerning the complainants was discussed at some length. Mr. Bouchard spoke in favour of the union supporting the complainants' position over that of the Brooks group. By way of a four-to-one vote, however, the committee decided not to proceed with the complainants' grievances. The one dissenting vote came from Mr. Bouchard. When being cross-examined with respect to the meeting, Mr. Bouchard agreed that the other committee members had felt that the failure of the company to post the tester crewmen positions in June had been improper and accordingly the complainants could not properly have been established on the job. Mr. Bouchard also readily agreed that the matter involved having to decide between the competing interests of two groups of employees.

9. In instances where the grievance committee has turned down an employee's grievance the union has had a practice of allowing the employee to raise the matter at a general membership meeting. This had been the practice at least since 1979. Mr. Bouchard testified that in one instance where the grievance committee had decided not to arbitrate an employee's grievance, a general membership meeting decided the grievance should proceed to arbitration. The union then referred the grievance to arbitration, although prior to the actual arbitration hearing, the union, with the consent of the grievor, settled the matter with the company.

10. It was the evidence of Mr. Schmitt, the incoming chairman of the grievance committee, that following the decision of the committee not to proceed with the complainants' grievances, Mr. Bouchard indicated that the matter would be raised at the next general membership meeting. According to Mr. Schmitt, "He [Mr. Bouchard] said he would stack the next membership meeting and have us proceed with it." When cross-examining Mr. Schmitt, Mr. Bouchard, who represented the complainants in these proceedings, unsuccessfully tried to get Mr. Schmitt to agree that Mr. Bouchard had not made the statement in question. Subsequently, when Mr. Bouchard gave reply evidence on behalf of the complainants, he did not deny that he had made the statement.

11. Following the meeting of the grievance committee on October 30, 1985, Mr. Schmitt telephoned each of the complainants to advise them that the grievance committee had decided not to support their position, and to explain the reasons for the decision. Mr. Schmitt also advised the complainants of their right to raise the matter at a general membership meeting.

12. The next regular union general membership meeting was held on November 18, 1985. At the meeting, Mr. Schmitt reported on the grievance committee's decision not to process the complainants' grievances. Mr. Bouchard then made a formal motion that the complainants' grievances be processed through the various stages of the grievance procedure to arbitration. The motion was approved by a majority of the members present.

13. The grievance committee next met on November 25, 1985. At the committee's request Mr. Les Woodcock, a union staff representative, was in attendance. Upon being advised of the facts of the case, Mr. Woodcock indicated that in his view the committee had correctly decided not to process the complainants' grievances. When testifying in these proceedings, Mr. Woodcock indicated that in his view the union would not want the complainants' grievances to succeed for if they did, it would take the backbone out of the seniority article in the collective agreement. At the November 25th meeting the grievance committee again decided not to process the complainants' grievances. Mr. Schmitt testified that in reaching this conclusion the committee members took into account the result of the vote at the general membership meeting, but nevertheless felt they could not process the grievances since the company's action had not been in violation of the collective agreement. Following this meeting, Mr. Schmitt phoned the complainants to advise them of the committee's decision.

14. On November 26 1985 Mr. Woodcock was telephoned by Mr. Bruce Noble, a Sault Ste. Marie lawyer, who indicated that he had been approached by certain employees who were concerned about the decision of the grievance committee not to process the complainants' grievances. Mr. Noble also indicated that consideration was being given to filing a complaint against the union. Mr. Noble proposed that the dispute be resolved by processing to arbitration grievances from both the complainants and the Brooks group, and then "let the chips fall where they may". Mr. Woodcock responded that the union could not take such an approach and still retain its credibility.

15. On December 4, 1985 Mr. Bouchard met with Mr. Woodcock and argued that the grievance committee was obligated by the vote at the membership meeting to process the complainants' grievances to arbitration. Mr. Bouchard also indicated that steps had been taken to

obtain the forms on which a complaint could be made to the Board. Mr. Woodcock replied that he would investigate the matter further. On December 9, 1985 Mr. Woodcock discussed the matter with Mr. Andy Lavoie, the union's regional representative. Mr. Lavoie advised Mr. Woodcock that in his view the complainants' grievances were contrary to the collective agreement, and notwithstanding the motion passed at the November 18th membership meeting, should not be processed to arbitration.

16. The next general union membership meeting was scheduled for December 10, 1985. On or about December 9th the Local's executive met with Mr. Woodcock to discuss the possibility of a motion being made at the membership meeting to rescind the motion passed at the November 18th meeting. Because such a motion would require two-thirds support, Mr. Woodcock indicated that such a motion would likely be defeated, and should not be attempted. On December 9th Mr. Woodcock also discussed the complainants' grievances with Mr. Schmitt, the grievance committee chairman. The agreed statement of fact states that at this time "Mr. Woodcock and the Grievance Committee were confident that the complainants' grievances were without merit".

17. Mr. Woodcock addressed the December 10, 1985 membership meeting. He stated that since the tester crewmen vacancies had not been posted in June, in his view the complainants' grievances were without merit. At least one of the employees present stated that he had recalled seeing a posting for the tester crewmen vacancies. Mr. Woodcock indicated that if this had been the case, he would support the complainants' grievances and urge that they be processed to arbitration. He also stated that he would ask the company to check the possibility that there had in fact been a posting. The following day Mr. Woodcock contacted Mr. James, the employee relations officer. Mr. Woodcock advised Mr. James that someone had recalled seeing a posting in June. Mr. James indicated that he would discuss the matter with the general foreman of the finishing department, who would definitely know whether or not this had been the case. Mr. James subsequently called Mr. Woodcock back and assured him the vacancies had not been posted.

18. Given the unsettled situation, Mr. Schmitt had taken the precaution of obtaining the company's consent to an extension of the time limits under the collective agreement for processing the complainants' grievances. In a meeting with the grievance committee on December 16, 1985, Mr. Woodcock indicated that no additional extensions to the time limits should be sought. At the same meeting, the grievance committee decided to drop the matter of the complainants' grievances once and for all.

19. As the Board has indicated in a number of previous decisions, section 68 of the Act does not give an employee an automatic right to have his grievance arbitrated. What the section requires is that the union direct its mind to the relevant considerations and make a good faith determination as to whether or not to go to arbitration. In making this decision the union is entitled to consider factors beyond the merits of a particular grievance. In *Dixie Canada Inc.*, [1984] OLRB Rep. Sept. 1179 a union refused to arbitrate the grievance of an employee who contended that he should not have been "bumped" out of his job by a more senior employee, because the senior employee had less skill and ability than he. Under the terms of the applicable collective agreement, seniority was to be the governing factor only if the ability and experience of two employees was equal. The union's decision not to go to arbitration was based, in part, on a general practice of promoting seniority over ability and experience. The Board, reasoning as follows, concluded that this was not a violation of section 68.

44. This Board would note that the instant case does not involve what has been termed the "tyranny of the majority" but is really a choice between two individuals, although each individual "represents" a view of article 15(4) which would affect others in the bargaining unit. The union, in opting for seniority rights as between two top-rated employees, was making a reasoned deci-

sion based on its view of the best interests of the bargaining unit as a whole. Union support for seniority clauses - or the interpretation of seniority clauses in the direction of giving greater weight to seniority over other factors - is hardly novel. Moreover, it is not for this Board to second guess the union's choice provided the relevant factors and competing interests are considered. The union candidly characterized the other interest, i.e. ability and experience, as one which is generally supported (and sought after) by management. This assertion is also neither novel nor indicative of impropriety on the union's part. Thus, in light of all the evidence and submissions by the parties, and in view of the principles underlying the duty of fair representation, the Board finds that section 68 of the Act has not been violated.

20. There is also a group interest in the settlement, or a decision not to arbitrate, a grievance even where it is reasonable to conclude that the grievance might succeed at arbitration. This interest was discussed as follows by the British Columbia Labour Relations Board in *Rayonier and I.W.A. Local 1-217*, [1975] 2 Can. LRBR 196:

"While a grievance may originally be brought by one individual, it is not unusual for it to involve a conflict with other employees as well as with the employer. Occasionally, this is true even in the facts of a particular case, but more often it arises from the implications of the general interpretation of the agreement upon which the particular grievor is relying. By necessity, a collective agreement speaks obliquely to many new and unforeseen problems arising during the course of its administration. Rather than relying on the arbitrator's interpretation of the vague language of the agreement drafted a long time ago, it is normally more sensible for the parties to settle that type of current problem by face-to-face discussions in the grievance procedure, with the participation of those individuals who are familiar with the objectives of the agreement and the need of the operation and are thus best able to improvise a satisfactory solution. Again, if the employees are to have the benefit of this process and of the willing participation of the employer in it, the law must allow the parties to make the settlement binding, rather than allowing a dissenting employee to finesse it by pressing his grievance to arbitration. As Archibald Cox put it: 'Allowing an individual to carry a claim to arbitration whenever he is dissatisfied with the adjustment worked out by the company and the union treats issues that arise in the administration of a contract as if there were always a 'right' interpretation to be divined from the instrument. It discourages the kind of day-to-day co-operation between company and union which is normally the mark of sound industrial relations - a dynamic human relationship in which grievances are treated as problems to be solved and contract clauses serve as guideposts. Because management and employees are involved in continuing relationships, their disposition of grievances and the arbitrator's rulings may become a body of subordinate rules for the future conduct of the enterprise ... When the interests of several groups conflict, or future needs run contrary to present desires, or when the individual's claim endangers group interests, the union's function is to resolve the competition by reaching an accommodation of striking a balance. The process is political. It involves a melange of power, numerical strength, mutual aid, reason, prejudice, and emotion. Limits must be placed on the authority of the group, but within the zone of fairness and rationality this method of self-government probably works better than the edicts of any outside tribunal.' Cox, *Law and the National Labour Policy*, at pp. 83-88."

21. In the instant case it is clear that the grievance committee concluded that the complainants' grievances were without merit. While the correctness of this decision may be debatable, there is nothing in the evidence which suggests that the decision was motivated by bad faith or discriminatory considerations, or that the committee members acted arbitrarily by not considering the relevant issues. Initially the committee members did not consider the implications associated with the grievances being successful at arbitration. Subsequently Mr. Woodcock did consider the implications and was concerned that, if successful, the complainants' grievances would weaken the seniority provisions in the collective agreement. This concern was clearly a factor in Mr. Woodcock's view that the complainants' grievances should not be processed. Mr. Woodcock's views on the matter likely influenced the decision of the grievance committee not to change its mind about going to arbitration. As already indicated, however, there is nothing inherently improper in considering other relevant matters in addition to the likelihood of success at arbitration. Accordingly,

I have no hesitation in concluding that the decision of the grievance committee not to proceed to arbitration was not a result of unlawful considerations.

22. The remaining question is whether the grievance committee's continuing refusal to go to arbitration in the face of the motion passed at the November 18, 1985 membership meeting amounted to a breach of section 68. The representative of the complainants contended vigorously that it did. The representative of the union acknowledged that the grievance committee's decision was somewhat unusual and placed an onus on the union to justify the committee's action. However, he contended, the evidence revealed such a justification.

23. In his final submissions Mr. Bouchard for the complainants did not contend that the union had discriminated against the complainants. However, having regard to Mr. Bouchard's testimony concerning an incident where the grievance committee had processed a grievance following a vote at a general membership meeting in favour of it doing so, I feel the matter to be worth a brief comment. As the Board noted in the *Douglas Aircraft Company of Canada Ltd.* case, [1976] OLRB Rep. Dec. 779, the prohibition against discrimination in section 68 is designed to prevent distinctions in treatment between individual employees or groups of employees which are not supported by cogent labour relations reasons. In the instant case the evidence indicates that the grievance committee based its decision not to proceed with the complainants' grievances notwithstanding the vote at the membership meeting on the basis of relevant labour relations considerations. As for the earlier case referred to by Mr. Bouchard, I was not advised as to the facts of the case. Accordingly, I do not know the relevant merits of the grievance, or whether the grievance, if successful, might have impacted on other employees or affected the manner in which the seniority provisions in the collective agreement were to be interpreted. The complainants have not, in other words, demonstrated that the two situations were sufficiently alike that the different approach of the grievance committee in the instant case indicates discrimination.

24. It is not suggested, nor does the evidence indicate, that the grievance committee acted in bad faith when deciding not to follow the results of the vote at the general membership meeting. Accordingly, the issue is whether the committee's conduct in not following the wishes of a majority of the members in attendance at the meeting acted arbitrarily. A refusal by the grievance committee to consider the results of the vote at the membership meeting might well have been arbitrary in the sense of ignoring a relevant consideration. However, in this case it is clear that the grievance committee did consider the results of the vote. Having done so, it concluded that it still would be inappropriate to proceed with the grievances.

25. The constitution of the union was not put in evidence. Further, no other evidence was led as to which body within the union properly had the final say on the question of what grievances were to go forward. What is clear is that the grievance committee and Mr. Woodcock understood that the membership vote was advisory only and that the committee had to make the ultimate determination. After the November 18th membership meeting, the grievance committee remained of the view that the complainants' grievances lacked merit. They consulted with a staff representative who advised them that the grievances should not be proceeded with notwithstanding the vote at the membership meeting. After taking these considerations into account as well as the results of the membership vote, the committee concluded that it would not be appropriate to proceed with the grievances. I am satisfied that the process they followed in reaching this decision was not arbitrary.

26. At the hearing, the complainants for the first time raised the argument that they were entitled to one week's pay in that they were laid off, and the Brooks group put in the tester crewmen positions, prior to the completion of the 5 days posting period required by the collective

agreement. The company may or may not have been in violation of the collective agreement in this regard. However, in that the complainants did not raise this issue with the union prior to these proceedings, it cannot be said that in representing them with respect to this matter the union acted arbitrarily, discriminatorily or in bad faith.

27. Having regard to the foregoing, this complaint is hereby dismissed.

1609-86-R United Food and Commercial Workers International Union, Applicant, v. **Skelhorns Bus Line Limited**, Respondent, v. Group of Employees, Objectors

Certification - Petition - Petitioners not represented by legal counsel - Inadequate evidence to establish voluntariness of petition - Lack of legal counsel not a mitigating factor

BEFORE: *G. T. Surdykowski*, Vice-Chairman, and Board Members *J. Rundle* and *R. R. Montague*.

APPEARANCES: *Archie Duckworth*, *Sharon Slaney* and *Sandra Ouellet* for the applicant; *Peter M. Whalen*, *C. MacIntosh* and *G. Hamm* for the respondent; *Victoria Watson* and *Reginald Watson* for the objectors.

DECISION OF THE BOARD; October 27, 1986

1. This is an application for certification.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

3. Having regard to the agreement of the parties at the hearing of this matter, the Board finds that all employees of the respondent at Petawawa, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor and office staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

4. In support of its application, the trade union has filed documentary evidence on behalf of 14 of the 18 employees in the bargaining unit. This documentary evidence took the form of membership cards, which include a combination application for membership and attached receipt. These cards are each signed by the employee and the receipts, which are countersigned by a witness (the collector), indicate that a payment of one dollar has been made to the union in respect of its membership fees. This documentary evidence is supported by a duly completed Form 9 Statutory Declaration which attests to the regularity and sufficiency thereof. In short, the form and content of the membership evidence are consistent with the requirements of section 1(1)(l) of the Act and, standing alone, demonstrates that the union has a level of membership support well in excess of that required by section 7(2) of the Act for certification without the necessity of holding a representation vote.

5. However, there were also filed with the Board 14 separate "statements of desire" or

“petitions” (the terms are interchangeable) each signed by one person and indicating opposition to the certification of the applicant. Twelve of the individuals whose names appear on the petitions are bargaining unit employees and of these, eight had previously signed membership cards and paid a dollar in respect of membership in the applicant trade union and were therefore members during the material times. As explained below, it is those eight petitions, which purport to indicate that the employees signing them have had a change of heart and no longer wish to support the application for certification, that might be relevant to the Board’s considerations. It was readily apparent that if a sufficient number of the possibly relevant petitions were found to be voluntary, which is the litmus test of relevance applied by the Board, they would raise sufficient doubt concerning the amount of continued support enjoyed by the applicant to prompt the Board to, in accordance with its usual practice, exercise its discretion to order a representation vote to resolve the matter. Finally, the applicant filed one “revocation” or reaffirmation of membership in the union. This signature was that of a bargaining unit employee who had first become a member of the union, then signed a petition, and still later signed the revocation. Whether or not this document is relevant to the Board’s considerations depends upon the Board’s view of the eight possibly relevant statements of desire.

6. As we have already intimated, the object in certification proceedings is to determine whether a majority of the employees found by the Board to be appropriate for collective bargaining wish to be represented by the applicant trade union in their dealings with their employer. The *Labour Relations Act* provides that the certification of trade unions in this province is based primarily upon an assessment of the trade union’s membership support as evidenced by membership records filed in support of an application. The Board does not inquire into opinions about the virtues of union membership except as evidence by that documentary membership evidence and any timely petitions filed with respect to an application. In Ontario, as in most Canadian jurisdictions, the representation vote exists as a residual mechanism for ascertaining the wishes of bargaining unit employees in cases where either the applicant union does not have the support of more than fifty-five percent of the bargaining unit employees which is necessary for outright certification under section 7(2) of the Act (but does have the support of not less than forty-five percent of them) or where the circumstances are such that the Board sees fit to require such a vote to be held notwithstanding that there is documentary evidence showing membership support in excess of fifty-five percent. The Board’s discretion in that respect must be exercised in a manner which is consistent with the legislated primacy of the membership evidence as the means by which employee wishes with respect to certification are determined.

7. The realities of labour relations are such that employees can and do change their views as to the desirability of trade union representation. In recognition of this, the Board has developed a procedure which recognizes the validity of union membership cards but retains the flexibility to seek the confirmatory evidence of a representation vote where employees file a timely petition which indicates a change of heart. Similarly, revocations or “counter petitions” are admitted by the Board to show a further change of heart and thereby nullify one or more signatures on a petition.

8. Unlike union membership evidence, petitions (and revocations) are not directly or precisely regulated by the Act. There is no statutory definition equivalent to section 1(1)(l), nor is there any requirement that the act of signing be confirmed either by monetary payment or otherwise. There is also no statutory declaration analogous to Form 9 (which attests to the regularity and sufficiency of membership evidence). However, the existence of such statements is contemplated by sections 103(2)(j) and 111(1) of the Act and Rule 73 of the Board’s Rules of Procedure. The Board has a long established practice of accepting such petitions and exercising its discretion to order a representation vote where the petitions are voluntary and contain a sufficient number of signatures of persons who had previously signed union membership cards to create a doubt as to

the actual level of support enjoyed by the union. The Board must be satisfied that persons indicating an apparent change of heart did so voluntarily and without being motivated by a perceived threat to their job security, a concern that the employer is involved in the petitions, or that a failure to sign could result in reprisals. It is only those persons who first signed union membership cards and subsequently signed petitions whose signatures are relevant to the Board's considerations. This is because employees for whom no membership evidence is filed are treated as being opposed to the application. Consequently, the signature of a non-union member on a petition can add nothing to the assessment of the support enjoyed by the union applying for certification.

9. The onus of establishing that a petition is voluntary is on the employees objecting to certification. To do so, they must call witnesses to give evidence, based on personal knowledge and observation, relating to the circumstances of the origination and preparation of the petition, and the manner in which *each* signature was obtained. The cases are legion in which a failure to appear and give satisfactory firsthand evidence regarding the origination and circulation of a petition has resulted in its rejection. Each and every signature on a petition must be identified and the circumstances under which it was obtained must be recounted by a person having personal knowledge thereof. Where such evidence is not presented, the signature may, and likely will, be discounted. In addition, the circulation of petitions must be free from the actual or perceived influence of management. Consequently, the Board will discount the signature of any employee who is or is perceived to be managerial. Similarly, where managerial personnel or persons who are perceived as having a greater proximity to management than other employees, are involved in originating or circulating a petition, it is difficult to escape the conclusion that the employees would reasonably have perceived the petition to be supported by the employer and its reliability as a gauge of employee desires will be destroyed (Rule 73(5); *Radio Shack* [1978] OLRB Rep. Nov. 1043; *Baltimore Aircoil Interamerican Corporation*, [1982] OLRB Rep. Oct. 1387; *Lo Food Division of Lumsden Brothers Limited*, [1983] OLRB Rep. May 676).

10. Revocations are also subject to the test of voluntariness but because such documents are not normally associated with management different considerations apply. Accordingly, in the case of a revocation the question is whether there has been any threat, intimidation, undue influence, misrepresentation or other improper conduct which affects its voluntariness (see *Frito-Lay Canada Ltd.*, [1981] OLRB Rep. May 538).

11. In this proceeding, the group of objecting employees or "petitioners" were represented by Victoria Watson, herself a bargaining unit employee, and her husband Reginald Watson, whose name does not appear on the employer's lists. There is no doubt that Mr. and Mrs. Watson came to the Board in good faith and that their views are honestly held. In addition, notwithstanding their admitted lack of legal training, they conducted themselves respectably throughout the proceedings. However, only Mrs. Watson testified with respect to the petitions and though she gave her evidence forthrightly and without hesitation, there was evidence that she could not give. What she could not say turned out to be as important as what she did say because the Board was left without evidence essential to establish the voluntariness of all but four of the petitions. It is the lack of this essential evidence that is fatal to the case that the objecting employees have tried to build. In arriving at our conclusions we have taken into account that the objecting employees chose not to avail themselves of their right to counsel. However, we cannot agree with counsel for the respondent that the gaps in the evidence resulting from the Watsons' lack of experience in such matters should somehow be overlooked.

12. Persons involved in proceedings before the Labour Relations Board have a right to appear before it with or without counsel. The Board recognizes the difficulties that face those persons who appear without counsel and normally affords such persons a somewhat greater latitude in

the manner in which they conduct their cases. However, the law applicable to issues raised in a proceeding before the Board does not depend upon whether or not a party before it chooses to retain counsel. Choosing to neither retain counsel nor otherwise inform itself does not relieve a party of the obligation to prove its case. It has often been said that ignorance of the law will excuse no one from his obligations under it. Consequently, the considerations of onus, the relevant tests, and the law applicable to the Board's consideration of petitions are apposite equally to cases where a party appears with counsel and those where a party appears without counsel.

13. In any event, Mrs. Watson's evidence indicates that she did in fact have sufficient information to enable her to know the case that had to be made for the group of objecting employees to succeed in their quest for a representation vote. She testified that she had obtained the Ministry's of Labour Guide to the Labour Relations Act which states, among other things:

How do you prove that a statement of desire does not have management support?

If the statement of desire will affect the certification process by causing the Board to order a representation vote, the Board will call upon the objecting employees to prove that the statement is voluntary.

A representative of the signing employees must appear and call witnesses to testify under oath about how the statement of desire originated (whose idea it was, who drafted it and where) and about the manner in which each of these signatures was obtained. This means that evidence must be given about the circumstances under which each employee signed the statement of desire by someone who is present at the time....

The persons who present the evidence at the hearing will be questioned by the Board, and may be questioned by the representatives of the union and the employer. If at the end of the inquiry the Board is not satisfied that the statement of desire is a voluntary expression of the employees who signed, it will be disregarded.

[emphasis in original]

In addition, the Form 6 Notice to Employees of Application For Certification And of Hearing which was posted by the respondent employer states, at paragraph 7:

Any employee, or group of employees, who has informed the Board in writing of his or their desire in accordance with paragraphs 4 and 5 may attend and be heard at the hearing in person or by a representative. Any employee or representative who appears at the hearing will be required to testify, or produce a witness or witnesses who will be able to testify from his or their personal knowledge and observation, as to (a) the circumstances concerning the origination of the material filed, and (b) the manner in which each of the signatures was obtained.

EXPLANATORY NOTE: Where employees fail to attend in person or by a representative or to testify or produce witnesses to testify as provided in paragraph 7 above, the Board normally does not accept the statement of desire as casting doubt on the evidence of membership filed by the applicant.

14. Before dealing with the evidence, we find it appropriate to comment on one further evidentiary matter. After Mrs. Watson had finished giving her evidence, the Board inquired of her and Mr. Watson whether they understood what the group of objecting employees had to establish, namely the voluntariness of the petitions, and whether they had any further evidence to offer or witnesses to call. Mr. Watson indicated that they had no further witnesses but that they did have a letter from one of the petitioners (identified throughout as P11) who Mr. Watson said was unable to attend the hearing of the matter. The Board indicated that absent an agreement of the parties, evidence relating to the matters in issue normally had to be presented through the oral testimony of a witness. Upon being advised of this hearsay difficulty, Mr. Watson withdrew the letter and

said nothing further about it. Nor did anyone else say anything at the time. This is noteworthy only because during argument Mr. Whalen, counsel for the respondent employer, indicated that, although he knew nothing of the contents of the letter, he was "concerned" that the Board had not admitted this letter at least for the limited purpose of ascertaining whether it indicated that an adjournment was in order to enable the filling in of what he felt were gaps in the petitioners' evidence. After noting that the petitioners had not raised the issue and that counsel had neither objected nor indicated any "concern" at the time that the matter had arisen, the Board asked counsel whether he was in fact now making an objection. He indicated that he was not. At no time, before or after counsel raised his "concern" did the objectors either request or otherwise indicate any need for an adjournment.

15. In accordance with the Board's usual practice in such cases, the Board conducted the initial examination of Mrs. Watson. At the conclusion of the Board's inquiry, the parties were given an opportunity to ask questions and present their evidence. In order to preserve confidentiality concerning the identity of the persons who allegedly opposed the certification of the applicant in accordance with section 111(1) of the Act, the signatures on the petitions are referred to by numbers throughout the proceedings.

16. Mrs. Watson has been an employee of Skelhorns Bus Line Limited for approximately one year. She is within the bargaining unit found by the Board to be appropriate for collective bargaining. She testified that it was the idea of another bargaining unit employee (P11) to oppose this application for certification. Mrs. Watson obtained information with respect to "statements of desire", including the wording thereof, from the Guide referred to above. Two of the petitions were handwritten, one by Mrs. Watson and one by P14 in Mrs. Watson's presence. The rest were typed, one by Mrs. Watson and the other by P11. All but P1 were mailed to the Board by Mrs. Watson.

17. Petitioner P1 approached Mrs. Watson on the employer's premises during working hours and inquired about signing a statement in opposition to the union. Mrs. Watson wrote out such a statement on the spot, P1 signed it, and left with it. This document was subsequently mailed to the Board, presumably by P1. Petitioners P3, P7 and P10 signed identical typewritten petitions in front of Mrs. Watson. However, Mrs. Watson's involvement was restricted to witnessing the person's signature on the petition and then mailing them to the Board. Both P7 and P10 had been previously approached by P9 with respect to their petitions and P9 had made the arrangements for Mrs. Watson to attend at the homes of those individuals in order to collect their signatures. Similarly, P3 had been approached by either P9 or P11 who also arranged for the signing. Mrs. Watson had no material discussion of substance with any of these petitioners to the extent that all she said to P7 was, "You know why I am here", or words to that effect. The petitions of P2, P6, P8, P9, P11, P12, and P13 were not signed before Mrs. Watson so we are left with no evidence of the circumstances under which they were signed.

18. It is clear from the evidence that P11 played a significant role in the origination of the petitions. That individual was also involved in their circulation and the collection of signatures. In addition, the evidence establishes that petitioner P9 was instrumental in collecting signatures on various of the petitions. In at least three possible relevant cases it was that latter individual's approach that led to the signatures actually being obtained. The Board has not had the benefit of the evidence of either of these significant individuals and we are left without sufficient evidence of origination and circulation to establish the voluntariness of 10 of the petitions. We have no way of knowing how any of these ten came to be signed or whether or not there was any impropriety involved. Consequently, there is insufficient evidence before us to satisfy the onus on the objecting

employees to establish the voluntariness of the 10 petitions that P9 and P11 were directly involved in collecting.

19. In the result, we are not satisfied that petitions P2, P3, P6, P7, P8, P9, P10, P11, P12, and P13 are voluntary. In arriving at our conclusion we find it unnecessary to consider the issue of P9's actual or perceived managerial status which was one of the bases upon which the applicant sought to impugn the petitions. Petition P1 is conceded by the applicant to be voluntary and we are satisfied that P4, P5 and P14 are voluntary.

20. Of the four voluntary petitions, only two were signed by bargaining unit employees who had previously signed union membership cards. Therefore only two of the petitions that were filed are relevant to the Board's considerations and their existence does not cast sufficient doubt upon the membership evidence submitted by the applicant to prompt the Board to exercise its jurisdiction under section 7(2) of the Act to direct that a representation vote be held notwithstanding that the trade union has filed membership evidence representing in excess of fifty-five percent of the employees in the bargaining unit. This conclusion makes it unnecessary for us to deal further with the revocation.

21. The Board is therefore satisfied on the basis of all the evidence before it, that more than fifty-five percent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on September 15, 1986, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

22. A certificate shall issue to the applicant.

CONCURRING OPINION OF BOARD MEMBER J. RUNDLE;

1. Based on the evidence placed before the Board, I concur with the result of the majority. Such result is consistent with Board practice.

2. However, it appeared to me that the objecting employees did not really understand what would be expected of them before they arrived at the hearing. This may have resulted from a lack of resources relative to those possessed by the trade union and the employer, a disparity which is not uncommon when employees appear before the Board either individually or as a group.

3. The central purpose of removing the Board from the judicial system was the expectation that people could appear before the Board without representation and not find themselves prejudiced. This case is demonstrative of the fact that the Board's certification procedures, more particularly the Board's requirements vis-a-vis statements of desire (petitions) have made that original objective particularly difficult.

4. The Board is in the process of revising the notice and information forms relating to applications for certification. Hopefully the revisions will clarify for objecting employees what is required of them.

1495-86-FC International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Lodge 128, Applicant, v. Teledyne Industries Canada Limited, Respondent

Adjournment - Evidence - First Contract Arbitration - Adjournment denied due to time constraints in s.40a(2) - Whether failure to make allegations in Schedule A to Practice Note 18 barring introduction during cross-examination - Number of bargaining sessions relatively low - Collective bargaining process not allowed to take full course - Application dismissed

BEFORE: *G. T. Surdykowski*, Vice-Chairman, and Board Members *D. A. MacDonald* and *D. A. Patterson*.

APPEARANCES: *Paul W. Timmins*, *Stan Petronski* and *Reg White* for the applicant; *John P. Sanderson* and *Terry Sloan* for the respondent.

DECISION OF THE BOARD; October 16, 1986

1. This application for a direction that a first collective agreement be settled by arbitration pursuant to section 40a of the *Labour Relations Act* came on for hearing on September 15 and 17, 1986. After hearing the evidence and the submissions of the parties, the Board orally dismissed the application (confirmed in writing on September 17, 1986) with written reasons to follow.

2. Before setting out our reasons, we find it appropriate to note a procedural matter that arose at the outset of the hearing. This application was filed with the Board on August 20, 1986. It was scheduled to be heard on September 15, 16 and 17, 1986. Section 40a(2) of the Act requires the Board to render its decision within thirty days of receiving such an application, in this case by September 19, 1986. At the outset of the hearing, Mr. Sanderson, counsel for the respondent, requested that the Board proceed on September 15 and 17, 1986 but not on September 16 as originally scheduled in order to accommodate him with respect to another matter he had scheduled on that date. Mr. Sanderson indicated that he had telephoned Mr. Timmins, counsel for the applicant, some two or three weeks earlier to advise him of this conflict in his schedule and to request the applicant's indulgence in this respect. Both counsel agreed that this proceeding would not likely take more than two days to complete (correctly as it turned out). Mr. Timmins indicated that he did not think there would be a problem but that he would have to obtain instructions from his client. There was no further communication between counsel until Mr. Timmins telephoned Mr. Sanderson's office during the week prior to the hearing, while Mr. Sanderson was on vacation, and indicated to his secretary that the applicant was not prepared to grant Mr. Sanderson the indulgence he requested. The parties maintained their positions before the Board. In addition, apparently by way of explanation, Mr. Timmins added that his client was not available on September 17, 1986 as scheduled. There was no agreement to extend the time limits imposed by the Act with respect to applications of this nature. The Board was of the view that counsel for the respondent was not entitled to assume either that the applicant would agree to his request or that he would otherwise obtain what amounts to an elimination of one of the three days of hearing scheduled. We therefore denied his motion and ruled that the matter would proceed on September 15, 16 and 17, 1986 as originally scheduled.

3. It is generally recognized that labour relations delayed are labour relations defeated and denied (see *Journal Publishing Co. of Ottawa Ltd. et al v. Ottawa Newspaper Guild, Local 205, OLRB et al.*, March 31, 1977 (Ont. C.A.) unreported). It is well known that, in recognition of that reality, the Board will normally refuse to grant an adjournment except on consent of the parties or

if it is satisfied that there are exceptional extenuating circumstances. In addition, it is the Board, not the parties, that is entitled to determine its practices and procedures. The Board's discretion with respect to determining whether or not adjournments should be granted is a broad one and a party that has had adequate notice of a hearing does not have a right to have it adjourned for the convenience of itself or its representative (*Re Flamboro Downs Holdings Ltd. and Teamsters Local 1879* (1979), 24 O.R. (2d) 400 (Div. Ct.)). Further, in applications under section 40a(2) of the Act, the time constraints placed upon the Board by the statute militate against the adjournments of proceedings even if the parties do consent (particularly in the absence of any extension of the time limits pursuant to section 40a(19)). This is not to suggest that the time limits specified in the legislation are anything other than directory (see *Air Care Ltd. v. United Steelworkers of America et al* [1976] 1 S.C.R. 2; *Re Metropolitan Board of Police Commissioners and Metropolitan Toronto Police Association (Unit B)* (1973), 37 DLR (3d) 487 (Ont. Div. Ct.) *Nepean Roof Truss Limited*, [1986] OLRB Rep. Sept. 1287), but applications for a direction that a first collective agreement be settled by arbitration must be dealt with expeditiously.

4. After the Board gave its ruling on Mr. Sanderson's motion, we adjourned briefly at his request. On returning, the parties advised the Board that the applicant was now prepared to agree that the hearing not proceed on September 16, 1986 as scheduled. Upon receiving undertakings from both parties that they would execute a written agreement extending the time limits imposed by section 40a(2), in the event that we were not able to conclude the hearing in the remaining scheduled time, the Board acceded to the agreement of the parties and directed that the matter would proceed on September 15 and 17, 1986.

5. We find it appropriate to comment on an evidentiary issue that arose in the course of the proceedings. In the course of his cross-examination, counsel for the union sought to establish that the company's wage proposals were designed to penalize the union supporters. Upon objection by counsel for the company, the Board ruled that it would not permit that line of questioning to be pursued because no allegations of that nature had been particularized or even made in Schedule A to the application (in which an applicant is required, by Practice Note 18, to set out a detailed statement of the material facts, acts and omissions on which it intends to rely) even though the union claimed that this alleged improper design was one reason why this application was brought.

6. The applicant and the respondent each called one witness. We heard from the applicant's Business Manager, Stan Petronski, Jr., and then from the respondent's Vice-President and General Manager, Terrance Sloan. On the basis of their evidence we make the following findings of fact.

7. The applicant trade union was certified as bargaining agent for a bargaining unit of (at the time) 19 of the respondent company's employees in September 1985. The process leading to certification was unremarkable. Subsequently, the applicant delivered a notice to bargain and the parties agreed to meet for the purposes of negotiating a collective agreement.

8. The union selected a negotiating committee consisting of Stan Petronski, Sr., Stan Petronski, Jr., Reg White, and three employees from the bargaining unit. The company's bargaining team consisted of Claudio Petracca, then Manager of Engineering and now Operations Manager, and John Whitehouse, senior salesman. In addition Mr. Sloan, who had the final authority to approve any collective agreement on behalf of the company, was involved with the company's team throughout although he did not participate directly in the negotiations. Of the persons involved, only the two Mr. Petronskis and Mr. White had any prior collective bargaining experience.

9. With one exception, the parties did not establish any ground rules for their negotiations. Instead of establishing a structure, procedure, or schedule, they proceeded on an *ad hoc* basis.

10. The parties' representatives met to bargain for the first time on November 26, 1985 at which time the union presented its proposed collective agreement, including a monetary package, to the company. There was no agreement on any of the union's proposals and none was expected. The parties did agree to the sole ground rule; that is, that they would deal with the non-monetary items first. They also agreed to meet again on January 16, 1986, at which time the company was to deliver its non-monetary proposals.

11. The parties did meet as scheduled and the company did present its proposals. Again, no agreement other than to meet again was reached and, again, none was expected. To this point the parties had exchanged positions but no bargaining as such had taken place.

12. The parties met again on February 6, 1986. This time they reached agreement on a number of items and "signed off" the articles relating thereto. There was disagreement on other matters. In addition, there arose a difficulty over the manner in which the agreement of the parties was to be signified. There was implicit agreement that individual articles or parts thereof would be "signed off" but the parties disagreed on the method to be used. The company felt it would be less confusing to use one party's document, chose its own, and proposed to incorporate agreement on matters not in its document in subsequent drafts thereof. The union wanted both sets of documents to be used and interpreted the company's position as a refusal to deal with the union's proposals.

13. The union decided that the negotiations were not progressing as they should and so, shortly after the February 6, 1986 meeting, requested the appointment of a conciliation officer. The company was somewhat surprised by this because it felt that the parties had just begun to bargain. However, the company willingly participated in the process and the parties met with the conciliation officer on March 20, 1986. The meeting was brief and there was no further agreement between the parties. At its conclusion the union requested that a "No Board" report be issued and accordingly, on April 10, 1986 there issued a notice that the Minister did not consider it advisable to appoint a conciliation board.

14. The union then suggested mediation. Again the company co-operated. The parties met with a mediator on May 5, 1986. There was no progress made in the bargaining at that meeting.

15. Events in mid May 1986 led directly to the union's decision to bring an application under section 40a of the Act. There was not a great deal of evidence of what transpired and the events are the subject of other proceedings before the Board. We did hear, however, that on May 12, 1986, a bargaining unit employee and member of the union was discharged by the company. Two days later, on May 14, 1986, some 13 to 14 other bargaining unit employees walked off the job, apparently in a show of support for their discharged co-worker. The union neither wanted nor authorized this walkout. At the time, the parties were in a legal strike/lockout position. The company has not permitted these employees to return to work but has continued to operate using a combination of bargaining unit employees who stayed on the job, supervisory personnel, and new hires.

16. It was shortly after May 14, 1986 and a subsequent refusal by the company to permit the employees who had walked off the job to return to work, that the union decided to apply for a direction that a first collective agreement between the parties be settled by arbitration. Part of the reason was that, if successful, the company would have been required, by section 40a(13) of the Act, to reinstate any employees who were either locked out or on strike.

17. On June 9, 1986 the company was served with the union's application. This application was defective and was not accepted by the Board. In the meantime the parties agreed to meet again with a mediator on July 4, 1986. There was a great deal of progress at this meeting and at its conclusion the only non-monetary issues remaining outstanding were the scope of the union's security clause and the emphasis to be given to seniority in layoffs expected to exceed fifteen days and recall therefrom. With respect to the union security issue we note that in one of the earlier meetings, likely February 6, 1986, the union brought to the company's attention the provisions of section 43 of the Act relating to compulsory dues checkoff. There is no evidence of the extent to which this issue was discussed further, if at all.

18. Wages and benefits were not discussed at all prior to or after the July 4, 1986 meeting. At that meeting the parties agreed to meet again on July 22, 1986 at which time the company was to present its monetary proposals. Notwithstanding the obvious progress that had been made, the union perfected with its section 40a application and filed the same with the Board on July 7, 1986 (we note that that particular application was withdrawn and therefore was never dealt with by the Board on its merits).

19. The parties did meet on July 22, 1986 as scheduled, again with a mediator. The company presented its monetary proposals. The union had previously presented its monetary offer which called for an increase of one dollar per hour for each employee. This amounted to increases between 9% and 12.8% for the bargaining unit employees based on what the union believed to be their current wages. The union reviewed only that part of the company's proposal dealing with wages and concluded that the company's offer would result in one employee receiving a 2¢ per hour increase and all other bargaining unit employees would suffer decreases in wages, even if all employees receive the maximum rates in the company's proposal. In making this assessment, the union relied upon information it had received from some of the bargaining unit employees. At no time did the union request any current wages and benefits information from the respondent. The company specified that red-circling would be used to ensure that no employees would suffer a wage reduction and it was the company's evidence, which we accept, that under its proposal, some seven employees would have received increase in excess of five percent, seven to eight employees would have received increases of one to five percent, and five would have received no increases. We find that the union's information regarding current wages was incorrect. Even if it had been correct, however, the union's conclusion with respect to the impact of the company's proposal was not. This is readily illustrated by a comparison of what the union thought were the current rates (as set out in Schedule A to Exhibit 1) and the company's offer (Exhibit 4). Although the classifications used by the parties are not identical, some direct comparisons are possible (using the union's model, which assumes that each employee is placed at the maximum rate):

Classification	"Current" Rate (per hr.)	Max. Rate Proposed (per hr.)	Increase Per Hr.	% Increase
(a) Shipper/ Receiver	\$ 9.00	\$ 9.25	\$.25	2.8%
(b) Heat Exchange Assembler	7.82	8.25	.43	5.5%
(c) Machine Shop	9.50	9.85	.35	3.7%
(d) Welding	10.20	10.30	.10	1%

20. In any case, the union concluded that there was no more progress to be made and left without meeting the company directly. Neither party has pursued further collective bargaining

since July 22, 1986 although the union did subsequently confirm in writing that it found the company's monetary proposals "totally unacceptable." Even then, however, the union had not yet reviewed or assessed the entire monetary package. Its statement was based entirely on the company's wage proposals. The company remained ready and willing to meet to bargain with the union throughout.

21. The settlement of a first agreement by arbitration has only recently become available under the *Labour Relations Act*. The central provisions are subsections 40a(1) and (2) which state as follows:

40a.-(1) Where the parties are unable to effect a first collective agreement and the Minister has released a notice that it is not considered advisable to appoint a conciliation board or the Minister has released the report of a conciliation board, either party may apply to the Board to direct the settlement of a first collective agreement by arbitration.

(2) The Board shall consider and make its decision on an application under subsection (1) within thirty days of receiving the application and it shall direct the settlement of a first collective agreement by arbitration where, irrespective of whether section 15 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of,

- (a) the refusal of the employer to recognize the bargaining authority of the trade union;
- (b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;
- (c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or
- (d) any other reason the Board considers relevant.

22. Both parties referred to the Board's decision in *Nepean Roof Truss Limited*, [1986] OLRB Rep. July 1005, in the course of their submissions. That is the Board's seminal decision with respect to the interpretation and application of these new provisions. As the Board indicated in *Nepean Roof Truss Limited, supra*, the remedy provided by section 40a of the Act does not supplant the primacy of the free collective bargaining process. Although it is remedial legislation which should be liberally construed and interpreted, it does not contemplate the automatic imposition of a first collective agreement simply because the parties have been unable to negotiate one. The condition precedent to access to the remedy is that the process of collective bargaining has been unsuccessful for one or more of the reasons enumerated in sub-sections (a) to (d) of section 40a(2).

23. As the Board observed in *Nepean Roof Truss Limited, supra*, we must be sensitive to the realities of collective bargaining in responding to requests that the Board direct arbitration of a first collective agreement. In considering such applications, it is the entirety of the collective bargaining process and the conduct of both parties that are relevant to the Board's considerations.

24. In this application, the union asserts that the process of collective bargaining has been unsuccessful because the respondent has violated section 40a(2)(b). It is the union's position that the company's bargaining positions with respect to the union security clause, the layoff and recall clause and wages were uncompromising and without reasonable justification. The union also submits that the respondent's approach to collective bargaining was improper and is a matter that the Board should take into consideration pursuant to section 40a(2)(d). The employer's actions, says the union, have resulted in a collective bargaining process being unsuccessful. Counsel for the union states that the company has chosen to fight a "pitched battle" in order to break the union.

25. We do not agree. We are not satisfied that it is accurate to say that the process of collective bargaining in which this trade union and this company have engaged has been unsuccessful. Though there is no minimum requirement in that respect, the number of actual bargaining sessions between the parties was relatively low. Notwithstanding that and the misunderstandings that arose as a result of the relative inexperience of the individuals involved in the negotiations and the lack of structure in the negotiations, the parties have made substantial progress. It is true that three important issues between the parties remain unresolved. However, collective bargaining is a process and the mere fact that a collective agreement has not yet been achieved is not determinative of the question of whether or not the *process* has been unsuccessful. In our view, the collective bargaining process between these two parties has not been allowed to take its full course. The parties have not fully discussed the remaining issues; they have hardly bargained or attempted to bargain on the matters still outstanding between them and we are not satisfied that bargaining is at an impasse.

26. We therefore find that the process of collective bargaining in which these two parties have engaged has not been unsuccessful. Subsection 40a(2) requires that the Board be satisfied that the collective bargaining process has been unsuccessful before it enquires further into the reasons for the inability of the parties to effect a first collective agreement. Consequently, we need not deal with whether or not any bargaining position adopted by the respondent has been either uncompromising or, if so, whether any of the uncompromising positions were adopted without reasonable justification. Nor need we deal with any of the other reasons suggested by the applicant.

27. We agree with the respondent that, on the evidence before us, the applicant gave up on the collective bargaining process too soon. The applicant's decision to apply for a direction under section 40a of the Act was triggered by the strike/lockout and an understandable desire to get the affected employees back to work. Although the existence of a strike or lockout may be a factor relevant to the Board's considerations in applications under section 40a, the mere existence of such a situation is not determinative of the issues before the Board. The words of the legislation make it clear that section 40a creates a mechanism that is available to the parties in circumstances where the process of collective bargaining has been truly tried but has been unsuccessful. Even then the mechanism is not available to the parties unless the lack of success is because of one or more of the reasons enumerated in subsection 40a(2).

28. It was for the foregoing reasons that the application was dismissed. Nothing in the Board's decision, or the reasons therefor, should be understood to mean that either party is precluded from bringing another such application before the Board, if the process of collective bargaining does prove to be unsuccessful.

3139-85-R; 3188-85-U; 3189-85-U Labourers' International Union of North America, Local 1059, Applicant/Complainant, v. **Tonda Construction Limited**, Respondent, v. Group of Employees, Objectors

Practice and Procedure - Failure of applicant to attend continuation of Board hearing - No requirement to issue an additional notice of hearing when continuation of hearing at which parties are present

BEFORE: *Harry Freedman*, Vice-Chairman, and Board Members *J. P. Wilson* and *H. Kobryn*.

DECISION OF THE BOARD; October 8, 1986

1. The applicant seeks reconsideration of the Board's decision issued orally on May 20, 1986 by which it dismissed a complaint under section 89, an application for consent to prosecute and the application for certification made under section 8 of the Act. The application for certification made under section 144 of the Act remains pending. The applications and complaint were dismissed based upon the representations made by counsel for the respondent and the representative of the group of objecting employees at the Board's hearing on May 20, 1986. Neither the applicant nor counsel for the applicant appeared on that day of the hearing.

2. The first day of hearing in this matter was April 25, 1986. The applicant and its counsel were in attendance on that day. Near the end of that day of hearing, the Board, after consultation with all counsel and the Registrar, fixed May 20, 1986 as the date for the continuation of the hearing. All parties and their counsel agreed to that continuation date in the hearing on April 25. By written decision dated April 30, 1986, the Board stated:

"10. This matter is referred to the Registrar to be relisted for hearing before this panel of the Board on May 20, 1986."

3. The Registrar mailed that decision to the parties by letter dated May 5, 1986. The Registrar did not, in his letter, state that the hearing would continue on May 20, 1986, nor did formal notices of hearing issue with respect to that continuation date.

4. Counsel for the applicant explains his failure to attend at the Board on May 20, 1986 as a mistake, caused in large part by the Board's failure to issue a notice of hearing in respect of May 20, 1986. Counsel submits that notices of hearing for continuation dates are required by both the *Statutory Powers Procedure Act* and the Board's Rules of Procedure and in any event the Board normally issues notices of hearing when hearings are continued.

5. In our view, there is no requirement to issue an additional notice of hearing when there has been one day of hearing and the parties present at that hearing have been informed both orally and in a written decision of the date for continuation of the hearing. A notice of hearing is necessary when a hearing is convened. When that hearing extends past one day, it is merely a continuation of that hearing for which formal notice had already been given. So long as the parties who are present at the first day of hearing of a matter are advised when the hearing will continue, it is not necessary for the Board to issue notices of hearing in respect of those continuation dates. Therefore, while counsel for the applicant and the applicant may have expected to have received a formal notice of hearing in addition to the Board's written decision, and did not do so, that unmet expectation does not adequately justify their failure to attend at the continuation of the hearing on May 20, 1986. The length of time that has elapsed in dealing with this matter and the additional

expense to the parties might have been avoided had the applicant or its counsel attended at the hearing on May 20, 1986.

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[Balance of decision omitted: Editor]

2389-85-JD Canadian Union of Operating Engineers and General Workers, Local 101, Complainant, v. **The Municipality of Metropolitan Toronto**, and The Canadian Union of Public Employees, Metropolitan Toronto Civic Employees Union, Local 43, Respondents

Abandonment - Bargaining Rights - Jurisdictional Dispute - Acquiescence by Local 101 in 1979 that heat treatment operators falling within scope of Local 43's bargaining unit - Failure by Local 101 in 1981 to respond to employer's notice to bargain - Local 101 abandoning bargaining rights - Complaint by Local 101 under s.91 dismissed

BEFORE: *Robert D. Howe*, Vice-Chairman, and Board Members *J. Wilson* and *W. F. Rutherford*.

APPEARANCES: *Michael O'Malley*, *Graydon Cresswell* and *Bob Sleva* for the complainant; *H. W. O. Doyle* for The Municipality of Metropolitan Toronto; *L. A. Richmond* and *J. Mele* for The Canadian Union of Public Employees, Metropolitan Toronto Civic Employees Union, Local 43.

DECISION OF THE BOARD; October 9, 1986

1. The names of the respondents are amended to "The Municipality of Metropolitan Toronto" and "The Canadian Union of Public Employees, Metropolitan Toronto Civic Employees Union, Local 43", respectively.
2. This is a complaint under section 91 of the *Labour Relations Act*.
3. During the course of their opening submissions, the parties agreed that the Board should determine, as a preliminary matter, the issue of whether the complainant (also referred to in this decision as "Local 101") has abandoned its bargaining rights in respect of persons employed by The Municipality of Metropolitan Toronto ("Metro").
4. Having regard to all of the evidence and the submissions of the parties concerning that issue, the Board, for the reasons set forth below, finds that Local 101 has abandoned those bargaining rights.
5. On December 2, 1960, the complainant's parent body was certified by the Board as the bargaining agent for all stationary engineers and their helpers in the employ of Metro, save and except engineers-in-charge and persons above that rank. It appears that those bargaining rights were subsequently assigned to the complainant, which entered into a series of collective agreements with Metro, the most recent of which is dated September 15, 1981. Article 28 of that agreement provided that it would remain in force from January 1, 1981 to December 31, 1981, and from year to year thereafter, subject to termination by notice, or alteration through negotiations following written notice of proposed changes.

6. Over the years, the number of persons employed by Metro as stationary engineers (and their helpers) declined substantially. In the early part of 1979, Patrick L. Schmidt, Metro's Director of Labour Relations, met with the Local 101 Committee and V. McManus, who was then the Business Manager of Local 101, to advise them that later that year, or in the following year, Metro planned to introduce at its main sewage treatment plant a heat treatment operation which would eliminate the need for stationary engineers at that location. A process involving Martin boilers, which required an operating engineer with a class 2 "ticket" as chief operator, and operating engineers with class 3 "tickets" as shift engineers, was to be replaced by a heat treatment process involving coil tube boilers, which did not require a stationary engineer for their operation as they could be operated by a person who possessed a certificate of qualification as a compressor operator.

7. It was Metro's position that the new classification of heat treatment operator created to operate that equipment fell within the scope of the bargaining unit of "outside" workers represented by The Canadian Union of Public Employees, Metropolitan Toronto Civic Employees Union, Local 43 ("Local 43"). During discussions with Local 101 concerning that matter, Mr. Schmidt offered to contact Mr. McManus if Metro required stationary engineers in the future.

8. Mr. McManus initially took the position that heat treatment operators fell within Local 101's jurisdiction and, in discussions which occurred during 1980, threatened to initiate proceedings before the Board to substantiate that claim. As contended by counsel for Local 43 in the instant proceedings, Local 101 clearly had an arguable case regarding that matter. The job calls issued by Metro in respect of that position listed as one of its qualifications possession of a certificate of qualification as a compressor operator or a stationary engineer (fourth class or better). Moreover, all of the initial job calls for that position were filled by persons who were qualified as fourth class (or better) stationary engineers. However, no such proceedings were launched, and by the summer of 1981 Local 101 had acquiesced in Metro's position that heat treatment operators fell within Local 43's bargaining unit.

9. In October of 1981, Metro notified Local 101 of certain "proposals for change in the renewal Collective Agreement" by letter dated October 15, 1981 to Mr. McManus. Although Metro was still checking off dues for at least three members of Local 101 at that time, and continued to do so until May or June of 1982, Local 101 did not respond to that letter and has not engaged in any collective bargaining with Metro since the time of that letter.

10. In early 1985, Mr. Schmidt contacted Local 101's business office. Upon discovering that Mr. McManus was no longer the Business Manager of the Local and that business representative Michael O'Malley was in charge, Mr. Schmidt spoke with Mr. O'Malley and advised him that Metro had decided to introduce a heat recovery operation at its main sewage treatment plant. That operation required a heat recovery operator with a certificate of qualification as a stationary engineer, second class or better, and an assistant heat recovery operator with a certificate of qualification as a stationary engineer, third class or better. Mr. Schmidt also advised Mr. O'Malley that Metro was of the view that the work to be performed by the persons in those classifications was not similar to the work which stationary engineers had previously performed for Metro, as it involved a substantial amount of maintenance work similar to the type that had traditionally been performed by members of Local 43. However, Local 101 did not share that view and claimed jurisdiction over the positions in question.

11. It is Mr. O'Malley's position, on behalf of Local 101, that the classifications of heat recovery operator and assistant heat recovery operator fall within the scope of the bargaining rights which, he submits, continue to exist under the aforementioned collective agreement between Local

101 and Metro. A grievance was filed by Local 101 prior to filing this complaint on December 20, 1985, and was referred to arbitration. However, the arbitration hearing has been adjourned. Counsel for Local 43 advised the Board that the basis for the adjournment was that his client had not been given adequate notice of the arbitration hearing. He further advised the Board that in granting the adjournment, the arbitrator expressed doubt that arbitration was the proper forum for resolving the matter of whether Local 101 or Local 43 is entitled to represent the workers in the classifications in question.

12. It is questionable whether Metro's bargaining notice dated October 15, 1981 had the legal effect of terminating Local 101's collective agreement as of December 31, 1981, as contended by Local 43. However, it is unnecessary to determine that matter in these proceedings. For the purposes of this decision, we are prepared to assume, without deciding, that the bargaining notice did not terminate the collective agreement and that it remained in effect by virtue of the "automatic renewal" clause contained in Article 28.01. It is well established in the Board's jurisprudence that the presence of such a clause does not preclude a finding that bargaining rights have been abandoned. See, for example, *Nordic Hotel*, [1975] OLRB Rep. June 495, at paragraph 16:

The automatic renewal clause in no way affects this conclusion. In fact, the existence of the clause is not unusual. In the *Belleville and District Builders' Exchange* case [1963] OLRB M.R. May 114 the Board outlined its general approach to such clause, in writing:

"In situations of this kind the Board has said that as a general rule it will have regard to a second automatic renewal but thereafter the onus is on the union to satisfy the Board that it has not abandoned its bargaining rights. This it may do by showing that it retained an interest through contact with the other party to the agreement. Just what contact is necessary depends on the facts in each particular case. In this case there was none.

In these circumstances the Board finds that the applicant has abandoned its bargaining rights which it has under the said collective agreement with the respondent."

See also *President Motor Hotel*, [1985] OLRB Rep. Sept. 1414; *O. & W. Electronics Limited*, [1970] OLRB Rep. Jan. 1213; and *Barrie Tanning, Limited*, [1966] OLRB Rep. May 128, in which the Board wrote, in part, as follows at paragraph 2:

.... While it may be that an automatic renewal clause will preserve a collective agreement in a state of suspended animation in perpetuity, an agreement which is permitted to renew itself from year to year without any attempt being made at improvement, particularly during times of general betterment of wages and working conditions, can become by its stagnancy, evidence of abandonment of the very bargaining rights upon which it was originally based....

13. In the present case, there is no evidence that in the period from 1982 to 1985 Local 101 retained an interest in the bargaining rights which it now seeks to assert through this complaint. As noted above, it initially claimed jurisdiction over heat treatment operators but, in spite of having an arguable case in that regard, subsequently acquiesced in Metro's position that they fell within the scope of Local 43's bargaining unit. Local 101 failed to respond to the notice to bargain given to it by Metro in October of 1981, despite the fact that there continued to be bargaining unit employees from whom it was receiving dues for at least seven months thereafter. No grievances were filed prior to the aforementioned grievance which preceded this complaint, and that grievance was itself prompted by a contact which Metro, through Mr. Schmidt, made with Local 101, rather than by any efforts on the part of Local 101 to maintain the bargaining rights which it had earlier possessed. Under the circumstances, we are unanimously of the view that Local 101 had abandoned its bargaining rights prior to the time at which that grievance was filed.

14. Mr. O'Malley, who represented Local 101 in these proceedings, advised the Board that

if Local 101 was found to have abandoned its bargaining rights, this complaint should be dismissed. Accordingly, the Board hereby dismisses the complaint.

3310-84-R Southern Ontario Newspaper Guild, Applicant, v. TV Guide Inc., Respondent, v. Group of Employees, Objectors

Bargaining Unit - Certification - Whether editorial department of TV Guide Magazine an appropriate bargaining unit - Whether departmental bargaining unit should be extended beyond newspapers to unorganized parts of publishing industry - Board surveying general considerations in determining appropriate bargaining units and collective bargaining patterns in newspaper industry

BEFORE: *R. O. MacDowell*, Vice-Chairman and Board Members *W. H. Wightman* and *B. L. Armstrong*.

APPEARANCES: *Naomi Duguid, C. M. Mitchell, John Bryant, Paul Pelletier* and *Brad Cundiff* for the applicant; *R. C. Filion Q.C., Andrea E. Esson, Keith Drake, Richard Dubuc, Jeffrey W. Shearer* and *Kenneth J. Larone* for the respondent; *Michael G. Horan* and *Rod Jamer* for the objectors.

DECISION OF R. O. MACDOWELL, VICE-CHAIRMAN, AND BOARD MEMBER W. H. WIGHTMAN; October 3, 1986

I

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. For ease of exposition the applicant may sometimes be referred to as "the union" or "the Guild" and the respondent, TV Guide Inc., may be referred to simply as "the company".

II

4. In this application the Guild is seeking certification as the bargaining agent for approximately forty-two employees working in the *editorial department* of TV Guide Magazine. The magazine is one of the publications produced by TV Guide Inc. at its premises on Holly Street in Toronto. The Guild claims that this "departmental bargaining unit" is appropriate for collective bargaining. The Guild does not seek to represent any of the employees in other departments of TV Guide Magazine, nor does the Guild seek to represent any of the employees who work on the other company publications produced at the same location. This application is restricted solely to the editorial department of TV Guide Magazine.

5. The company disagrees with the union's proposed bargaining unit. The company argues that it is far too narrow, because the editorial department employees do not have a community of interest which is separate and distinct from that of other company employees in other departments. The company asserts that the "appropriate" unit should encompass the employees of both TV

Guide and "Canadian Living", another publication produced at the same business location. In the alternative, the company argues that the bargaining unit should, at the very least, encompass all employees of TV Guide Magazine. Counsel for the company referred us to the decision in *The Spectator, A Division of Southam Inc.*, [1981] OLRB Rep. Aug. 1177, where the Board reviewed the anomalous pattern of bargaining units in the newspaper industry and clearly indicated that it would no longer be receptive to the creation of fragmented departmental bargaining units, unless the employee grouping met the requirements for a "craft unit" under what is now section 6(3) of the Act, or the proposed departmental unit was otherwise demonstrably "appropriate". The pertinent paragraphs are as follows:

7. As a general practice the Board does not grant certification on a departmental basis. For historical reasons exceptions were made in the newspaper and printing industry. Those industries were traditionally organized by craft unions at a time, long pre-dating the existence of this Board, when the printing trades were distinguished by specialized skills that gave rise to clear distinctions along craft lines. (See, Zerber *The Development of Collective Bargaining in the Toronto Printing Industry in the 19th Century* (1975) 30 IR/RI 83. From its earliest days the Board granted certificates in the newspaper industries reflecting the traditional craft designations. (See, e.g. *The Ottawa Citizen*, [1944] OLRB Rep. Aug.; *The Star Publishing Company of Windsor, Limited*, (1945) CLLC 10,424. The traditional preponderance of craft units in the newspaper industry tended to produce more fragmented bargaining structures than would be encountered in other industrial settings. That may explain why, over the years, the Board often acceded to the agreement of the parties to departmental units of employees who did not possess craft skills. Generally in an industrial setting the Board would, apart from any special craft units, contemplate a breakdown of employees for collective bargaining purposes into office and clerical employees on the one hand and production employees on the other. When a plant is substantially organized along those lines any union seeking to obtain certification for a departmental unit is normally required to take a tag end unit of all unorganized employees. The obvious reason is to avoid undue fragmentation in collective bargaining.

8. In the instant case the parties were unable to refer the Board to any precedent decisions in which the practice of permitting departmental bargaining units in the newspaper industry was fully explained. A review of the Board's prior decisions suggests that the practice has evolved more as a matter of deferring to the agreement of the parties in the industry, an obviously critical consideration, rather than by the application of normative collective bargaining principles in disputed cases. If in the past the Board has acceded to agreements establishing the non-craft departmental units in the newspaper industry, it has not done so without some guarded concern. In the *St. Catharines Standard Limited*, [1975] OLRB Rep. July 601, the Board granted certification for all employees in the classified advertising department of the employer newspaper. In so doing it commented, at page 603, as follows:

• • •

9. The foregoing passage indicates the Board's concern for the excessive fragmentation of bargaining units while recognizing the countervailing value of giving the greatest weight to the agreement of the parties in the structuring of bargaining units. *Implicit in that statement, however, is an indication that where there is no agreement between the parties on the structure of a bargaining unit in the newspaper industry the Board will not hesitate to apply established general principles respecting community of interest in fashioning appropriate bargaining units.* This is the first application in the newspaper industry which we are aware in which the parties have not been agreed on the designation of the bargaining unit. To that extent the Board is compelled to address the question of whether non-craft departmental units should be the presumed rule in the newspaper and printing industry or whether collective bargaining could be appropriately grounded on a more comprehensive basis.

10. In the past twenty years the newspaper industry has seen some fast moving and dramatic technological change in its methods of production. (See, generally Baker, *Printers and Technology* (1957, Columbia University Press, New York); Kelber and Schlesinger *Union Printers and Controlled Automation* (The Free Press 1967, New York); Rogers and Friedman *Printers Face Automation* (Lexington Books, 1980, Lexington Mass.).) The movement of news-

paper printing processes from hot lead to cold metal and to still more modern computerized word processing and photo-printing equipment has already spawned complex jurisdictional disputes at a number of Canadian newspapers (including LaPresse, The Pacific Press and The Toronto Star; see, the *Toronto Star Newspapers Limited*, [1979] OLRB Rep. May 451; *Toronto Star Newspapers Limited*, [1980] Rep. Apr. 565 at 566). Labour boards have been forced to become increasingly cognizant of the collective bargaining ramifications of these developments in the newspaper and printing industry and have been required to fashion decisions responsive to the emerging reality.

11. In a recent decision the National Labour Relations Board had occasion to consider the bargaining unit appropriate in a newspaper transformed by recent technological change. (*Leaf-Chronical Company*, (1979) 244 NLRB 1104; 102 LRRM 1306). In that case the employer maintained that the Board's traditional practice of granting departmental units should be followed and that the composing room, camera room, press room and mailing room should be separated into individual bargaining units. It also requested a separate multi-location editorial or news department bargaining unit. After closely examining the facts the NLRB noted that there had been a substantial blurring of craft lines in the newspaper's operations. It noted that the only skill required in the composing room was typing and that there were no skill or experience prerequisites for employment in any other of the production departments. The Board also remarked that the merger of the Mailer's Union with the Typographers (I.T.U.) further blurred traditional craft lines. Applying normal considerations of community of interest the Board concluded that two bargaining units were appropriate, one being a comprehensive unit including all mechanical department employees of the newspaper and the second being composed of all newsroom and editorial employees.

12. We see no reason why, in a similar case, this Board should arrive at any different conclusion. *When the employees of a newspaper or printing shop perform discernable craft skills and an established craft union applies to represent them in collective bargaining the overriding policy of the Act, expressed in section 6(2), [now section 6(3)] is that the value of special representation overrides the disutility of fragmentation. On the other hand, where employees do not exercise technical skills or perform craft work which meaningfully distinguishes them from other employees there should be no presumption in favour of fragmentation. In future applications in the newspaper and printing industry, therefore, where it does not appear on the evidence that the preconditions to the certification of a craft unit are made out the Board will be open to submissions for the structuring of bargaining units on the basis of normal considerations of community of interest. There should no longer be any presumption that non-craft bargaining units will be structured by department; without limiting the direction in which the Board may wish to take in any given case we see no reason why in the newspaper and printing industry, apart from the establishment of legitimate craft units, the representation of employees for collective bargaining purposes should be any less comprehensive than in other industries.* Where the evidence discloses a separate community of interest among all office and clerical employees, all mechanical production employees and all editorial or newsroom employees bargaining units should be fashioned accordingly.

[emphasis added]

6. The respondent urges the Board to follow the approach enunciated in *The Spectator*, and suggests that here there is an even stronger case for an "all employee" unit. Counsel points out that, at the *Spectator*, there were already departmental bargaining units to which the employer had previously agreed, and the union could assert a "reliance interest" based upon an apparent Board policy of accepting such units as being appropriate. Here there is no pre-existing acquiescence in, or pattern of, departmental bargaining; and, the *Spectator* decision was a signal of the Board's intention to review its approach. Finally, counsel notes that this is a *magazine*, not a *newspaper* or printing shop, and there is no established pattern of departmental bargaining in magazines. Counsel argues that the anomaly of departmental bargaining units should not be extended to this largely unorganized sector of the publishing industry.

7. The company's position is supported by a number of editorial department employees

who intervened and urged the Board not to adopt the departmental bargaining unit proposed by the Guild. These employees expressed their concern about any bargaining structure which, they said, would "artificially" divide them from other TV Guide employees with whom they were commonly associated in their work. They did not see the utility of a collective bargaining process confined to only one department, and they worried that a bargaining unit so narrowly defined might unnecessarily restrict their own job opportunities. Like the company, they argued in favour of a broader bargaining unit encompassing all employees of the respondent employer.

8. The hearing on this bargaining unit question consumed a number of days, and both the company and the Guild took the opportunity to put before the Board a good deal of evidence about the company's organization, the particular circumstances of its employees, and the pattern of collective bargaining in the newspaper industry. It is neither necessary nor practical to reproduce all of the details of that testimony. It is sufficient to say that we have tried to sketch in an overview of the facts, taking into account such factors as: the clarity, consistency, and overall plausibility of the testimony when subjected to the test of cross-examination and compared with the evidence of other witnesses; the ability of the various witnesses to resist the tug of self-interest when giving their evidence; and what seems to be most probable in all the circumstances. Some of the evidence reflected the personal experience, or interest of the witnesses, and we have tried to take that into account. In the case of the evidence of the historical development of collective bargaining in the newspaper industry and its current problems, we must necessarily piece together the existing pattern from the sometimes subjective and impressionistic testimony of the participants in that collective bargaining process.

III

9. TV Guide Inc. is the publishing arm of the Montreal-based media conglomerates Telmedia Inc. and Telemedia Enterprises. Telemedia is also involved in radio and TV broadcasting. For our purposes, the only relevant portion of its business is on Holly Street in North Toronto where it has broadcasting facilities and its subsidiary, TV Guide Inc., produces three English language magazines: TV Guide, Canadian Living, and Canadian Living Specials. TV Guide is a weekly magazine; Canadian Living is published monthly (thirteen times a year) and Canadian Living Specials appear occasionally throughout the year.

10. The three magazines have a different editorial and commercial focus. The Canadian Living magazines are primarily concerned with food, "homemaking" and "family life" items, and are typically displayed and sold in supermarkets. TV Guide is also sold in supermarkets and has occasional recipes and other food features but, as its name suggests, TV Guide is primarily concerned with material pertaining to television viewing and the entertainment industry. Much of the book consists of daily television listings (by date, hour and channel) interspersed with related advertising, or general consumer advertising unrelated to television.

11. TV Guide is produced in accordance with a licence or franchise agreement with the American publisher of the U.S. magazine of the same name; and, in fact, TV Guide receives both feature items and a variety of services from its American counterpart. These services include use of the American company's main frame computer in Radnor, Pennsylvania which can generate thousands of what the witnesses described as "blurbs"--very short items describing in a few words or lines the content of various television shows (especially reruns of movies or popular programmes such as M*A*S*H). The volume of reruns may vary from season to season, but, obviously, any particular issue of TV Guide may contain quite a bit of this pre-written material. The Radnor computer is also used to assist in the layout of the Canadian magazine.

12. There are twelve different editions of the Canadian TV Guide Magazine, corresponding

to the different regions of the country. Seven of these magazines are produced at the Holly Street location in Toronto, and the other five are produced in Vancouver. The content of each book depends upon the number of network and private stations in each area, and the particular programme schedule of those stations. Each book is different, but there will necessarily be many similarities because of national advertising, syndicated or network programming, or the rerun of the same shows at different times.

13. Telemedia operations occupy most of the first and all of the second and third floors of the Holly Street building. At the centre of the building, on each floor, are common elevators, washrooms and staircases. On the ground floor there is a common reception area and two large areas occupied by "The Sports Network" and "Telemedia Broadcasting Systems". There is also a common mailroom, a typesetting area and an area used for Canadian Living Specials. On the second floor one finds the TV Guide editorial department, TV Guide sales, TV Guide advertising, a public relations department, the transportation department, the production services department, and the marketing services department. The TV Guide editorial department occupies one end of the building and the other departments are arranged, sequentially, around the perimeter of the building. On the third floor are the executive offices, accounting department, lunchrooms, promotion department, Canadian Living Editorial department, Canadian Living sales department and the Human Resources department. These various departments are physically contiguous and the "open area concept" office design reduces the number of physical barriers between departments and work areas. The editorial department has its own work area but it is not geographically isolated from the work or employees of other departments.

14. From a functional point of view there are several departments which provide services to all three magazines produced at Holly Street. These include the Human Resources group (personnel department - payroll, staffing, salary administration), finance, accounting, marketing services (circulation and customer response), promotion, public relations, transportation (shipping/distribution), and production services (including typesetting). All departments and employees use (in various degrees) the same elevators, stairs, lunchrooms, halls, water fountains, washrooms, meeting rooms, telephone switchboard system, Xerox machines and computer system. They all make use of the same mail room, mail delivery system, reception area, and central purchasing of office supplies.

15. The evidence does not disclose the precise breakdown of the number of employees in each department, although the respondent indicates that there are approximately 187 employees in its proposed "all-employee bargaining unit", and the schedules filed with the Board indicate that there are approximately forty-two employees in the editorial department. Mr. Richard Dubuc, Manager of Human Resources estimated that there are approximately fifty-one employees (including management) in the editorial department, thirty-one in advertising, twenty-two in the typesetting group and, in total, about thirty-five in the production services department. The Canadian Living editorial department has about twenty-two employees and the Canadian Living sales department has about eight.

16. Despite the many shared services mentioned above, TV Guide and Canadian Living have their own managerial structure and separate editorial departments. There is no co-ordination of editorial content, although some of the contributors are the same - particularly in the case of food writers, stylists, and photographers. Canadian Living obtains a considerable amount of its material from freelancers and persons it employs, while TV Guide obtains a high percentage of its material, in the form of listings, from the Radnor computer or directly from the stations or networks. According to Brad Cundiff, the "copy chief" and a union witness, the journalistic and editorial skills of the contributors to Canadian Living (employees or freelancers) are probably higher

than those at TV Guide because the Canadian Living feature articles tend to be much longer. The persons who do editing at Canadian Living tend to be more senior and are more highly paid. Nevertheless, although the Canadian Living "product" is different, much of its target market is the same (the newsstand or supermarket shopper rather than subscriber), and, in a general sense, many of the journalistic, editorial, technical or business skills necessary for its publication are the same as those necessary to produce TV Guide. That is why the two magazines can comfortably share the services of the several departments common to both of them. Without wishing to oversimplify, the situation is somewhat like that of two related product lines produced in a single factory.

17. The employees of all the departments of both magazines work in relatively close proximity to one another and have access to common areas such as lunchrooms or washrooms. Employees from both publications or any department (as necessary) can use the TV Guide screening room or library. There is a standard employment application for all prospective employees in all departments of all English publications. The terms and conditions of employment and benefit programme are the same for all employees (i.e., pension plan, medical insurance, life insurance, dental insurance, vacation, hours of work, time off, summer hours, benefit administration, statutory holidays, employee counselling, social club, Christmas party, tuition fund). Overtime opportunities and hours vary somewhat depending upon the demand in a particular department, but are administered in the same way. There is a common job posting policy applicable to all employees in the publication and broadcast group, although, in practice, there are more vacancies and opportunities for mobility within the publishing area.

18. There is no difference in the way that salaries are set and administered - as might be expected where, as here, there is a single "Human Resources" department performing the personnel functions for all employees of the company's English publications. While there is no standardized grid or wage classification system, the basis for setting all wage rates is the same: a periodic wage survey covering twenty-six other magazines. An effort to update and standardize the job classification system, beginning with the editorial department, was interrupted by this certification application.

19. For corporate accounting purposes, the wage bill of TV Guide and Canadian Living are separate, however, all employees of both magazines are paid on cheques issued by TV Guide Inc. which include an attached, standardized statement of earnings and deductions. In keeping with the company's common employment practices, benefit policies, and job posting procedures, the company periodically circulates its "in-touch bulletin", which is an internal information document directed to all employees of TV Guide Inc. to advise them of current business or personnel developments, such as promotions or transfers between departments. In none of these aspects of the employment relationship is there anything unique about the employees in the TV Guide editorial department.

20. The employee movement between departments and publications is rather interesting in view of the union's assertion that the employees in the editorial department have a unique community of interest, separate and distinct from that of all other departments of TV Guide or Canadian Living. If that were the case, and if the TV Guide employees were an island of particular self-interest, one would not expect much movement between departments or publications. But such transfers do occur, both between departments and between publications. The evidence suggests that the editorial employees do not occupy the kind of insular, watertight compartment that the union describes in its submissions.

21. In October 1980, Mr. F. Baldock was hired as a features editor for Canadian Living.

Eight months later, he became a features editor in the TV Guide editorial department. Thereafter he became an assistant managerial editor and executive editor in TV Guide editorial. Barbara Borne was first hired on a part-time basis as an editorial secretary in Canadian Living. She was then transferred (in 1982 and 1983) to two clerical positions in TV Guide editorial. In 1984 she was transferred again to the promotion department, which, as we have already noted, provides services for both TV Guide and Canadian Living. Ms. B. Bruner was an editorial secretary for Canadian Living, a promotion assistant in the promotion department, a secretary in TV Guide editorial and, later, assistant photo editor, then editorial business manager for TV Guide editorial. Keith Crossing was a field representative in the TV Guide circulation department, a promotions representative in the circulation department and, in 1979, became French editor in TV Guide editorial. Ms. W. George was an administrative secretary (general) and administrative assistant for Canadian Living then became the librarian for TV Guide editorial. Ms. C. Hau, hired as a telex operator for TV Guide editorial, then was transferred to accounts payable clerk in the finance department and, later, to the position of data entry clerk in the circulation department. J. MacCrea was a secretary in the finance department and marketing departments before being transferred to the payroll clerk position in the payroll department and, finally, the secretary to the editor (excluded from the bargaining unit) in the TV Guide editorial department. Lisa Sandor was hired as an art assistant in TV Guide editorial before being transferred ten months later to a similar position in the promotion department. L. Speziale was hired in June 1976 as a subscription clerk in the circulation department and, later, was transferred or promoted to the positions of station editor, production editor, and assistant regional editor in TV Guide editorial. J. Sumbler, hired in 1983, was first employed as a bilingual station editor for TV Guide editorial before being transferred to the promotion department. D. Paris was hired in 1984 as a station editor for TV Guide editorial but, four and a half months later, was transferred to the position of copy editor with Canadian Living. N. Dobrowsky, first hired as a secretary in the (shared) administration group was transferred thirteen months later to the position of assistant editions manager for TV Guide editorial. Ms. S. Price, hired in 1977 as a subscription clerk in the subscription department, later became a receptionist in administration, a secretary in the marketing department, a secretary in TV Guide editorial, the business co-ordinator in TV Guide editor and, finally, the French co-ordinator in Canadian Living.

22. We recognize that some of these “transfers” took the form of a quit and immediate “re-hire” and that a number of them involved secretarial or administrative staff rather than “editors” or “journalists”, but, as we shall see, those terms may be a bit misleading, and the fact remains that there is a degree of employee mobility between departments and magazines. Moreover, the mix of employee skills within the editorial department is not as unique as some of the union witnesses suggested.

23. At the time of the application there were forty-four employees in the editorial department: forty-two on Schedule “A” and two on Schedule “D”. Of these forty-four employees, eight are classified as “station editor” - the largest single classification. The primary function of a “station editor” is to maintain contact with local stations in order to obtain programme listing information which is checked for accuracy and entered into the Radnor computer. Each station editor maintains contact with six to nine stations to gather such information. Much of the U.S. network information will already be in the computer, as will information on any programme reruns. The employees working on the Toronto book will have a higher proportion of listings which are not on the computer because of the larger number of local independent stations.

24. The station editor’s “editorial” task is primarily one of checking the accuracy of the written material. They might, occasionally, write last minute “blurbs” or make a late correction or, very occasionally, an individual might “try his hand” at an even longer piece; but, in practice, writing is only a small part of their duties. It is both infrequent and not a requirement of the job.

25. Keith Larone, the editor of TV Guide, identified twenty-two jobs (or fifty per cent of the proposed bargaining unit) which do not involve any significant writing component. Accordingly (leaving aside, for the moment, the actual level of journalistic skill required for these "writing jobs"), it is difficult to describe the proposed unit as one composed primarily of writers or journalists. Nor should allusions to the writer's "craft" or "artistic sensibility" obscure the fact that the proposed editorial bargaining unit contains quite a number of employees who are not "writers" or "editors" at all.

26. A summary of the educational background of the employees in the editorial department indicates that there are about thirteen employees with specific training in journalism, and several others with degrees in English or other arts degrees in which they have taken creative writing courses. However, that summary, when matched with the witnesses' evidence also indicates that there are a number of employees doing "journalistic-type" jobs who do not have any formal training in journalism, and others who have a journalistic background but are working in areas where there is little writing or journalistic content. By way of comparison, we might note that there are also a number of employees in the promotion department who have post-secondary training in journalism, art or English, and that some of these employees are involved in writing advertising or promotional material. Their jobs also involve a writing, design or artistic component. The promotion department is much smaller, but the mix of educational backgrounds is not significantly different from that of the employees in the editorial department. The parties also agree that some good writers or popular journalists do not have any formal training at all.

27. We mention these factors because implicit in some of the testimony (see *infra*) was the suggestion that, by reason of job function, training or inclination, the employees in the editorial department of TV Guide form a distinct and cohesive group like the mechanical tradesmen who are often represented by craft unions in separate bargaining units specific to their trade. That is simply not the case.

28. The witnesses reviewed, in some detail, the job functions of the various members of the editorial department. We do not think that it is necessary to do so here. The evidence was not entirely consistent and, according to some of the witnesses, the written job descriptions were not entirely accurate. What is clear is that within the restrictions imposed by the specialized and somewhat limited format of the magazine, there is, among the writers, a hierarchy of employee skills ranging from those sufficient to prepare the "blurbs" or other short, descriptive pieces of less than one hundred words which appear throughout the magazine, to those of columnists or feature writers whose work is more substantial, sophisticated or analytical. A review of the issue of the magazine filed with the Board reveals that most of its local content is in the former category and is based upon material often supplied by the networks or TV stations. There are not very many long items, nor very many TV Guide employees who regularly produce them.

29. To put all of this in perspective, it seems to be common ground that neither TV Guide itself nor the makeup of its editorial department are comparable to a daily newspaper. Unlike a newspaper, TV Guide buys a lot of its services. It does not have its own truck fleet, presses or printing plant. It buys its photographs and many of its feature articles from freelancers or syndicates. Food photographs are also purchased, along with the services of a food tester and food stylist. TV Guide is not "news driven" nor predominantly dependent upon subscription sales. It is not performing the same function as a newspaper, nor is it organized in the same way. Those differences are reflected in the makeup of the "editorial department".

30. According to Mr. Larone (who has twenty-eight years' experience in the publishing industry and has worked for a variety of newspapers, including the Toronto Star), TV Guide has a

number of employees with the title “editor” who simply would not be hired in the editorial department of a newspaper. The title does not involve the same degree of skill, training or understanding of such things as investigative reporting, interviewing techniques, makeup and design. Mr. Larone testified that the editorial department of the Star would have a much higher proportion of employees involved in writing, and such writing would involve a much more sophisticated journalistic component. A newspaper such as the Toronto Star would only hire journalism graduates who would then work their way up the journalistic ladder. The journalistic standards are much higher than those required of, or possessed by, most TV Guide employees. Even the entertainment section of the Star involves much more sophisticated writing than that found in TV Guide - an impression readily confirmed by a perusal of items which fill most of the space in TV Guide. In Mr. Larone’s view, ready access to banks of computer-stored reviews will mean that, in the future, the ability to manipulate existing files of written material will be as important as new writing.

31. This is not to depreciate the value of the work performed by employees in the editorial department. It is simply that their job titles are a little misleading and neither their skills nor functions are necessarily the same as those of persons working for a newspaper and having the same job title. If journalism were regarded as a “profession”, then many TV Guide editorial employees would not be included, or, in a few cases, would be ranked in the lower echelons. As we have already mentioned, a substantial number of the employees in the editorial department are not really “writers” or “editors” at all.

32. This general impression was not seriously contradicted by the union and, indeed, was confirmed by Professor Bob Rupert, a union witness. Mr. Rupert has held a variety of union offices and has had experience on both sides of the bargaining table. He is now a professor of journalism at Carleton University. He testified that the essence of professional journalism (apart from an ability to write) is self-assignment and direction, sound research and the exercise of independent judgement in gathering information. Very few of the editorial department employees require those journalistic abilities. Professor Rupert said that TV Guide was not the kind of publication for which Carleton graduates would want to work for very long, although it might be acceptable as a first job. He agreed with company counsel’s suggestion that, in comparison with a daily newspaper, the journalism and editorial content of TV Guide was decidedly “down-scale”.

33. Professor Rupert further testified that in his experience on “newspapers”, the journalists and editors in the editorial department have skills and interests which are quite different from those of other employees at the newspaper. He said that the editorial department tends to view itself as a separate entity, dealing directly with the publisher and the public. There is a certain professional self-image which makes it more likely that journalists will know and associate with other journalists whom they see at the press club rather than other employees in their own newspaper. This ethos of independence is reinforced by the fact that newspapers are “news driven”, and there is real competition with other journalists to get or develop good “stories” within sometimes rigid deadlines. Professor Rupert said that editorial departments tend to be insular, much like the departments of a university. Editorial department employees have their own interests and objectives and there is little functional relationship with other departments of the newspaper.

34. Is this an accurate picture of the editorial department of TV Guide? The union suggests that it is. In the union’s submission, the editorial department employees have a distinctive community of interest and there is little functional interrelationship or interaction with employees in other departments. Brad Cundiff, a union witness, even testified, in direct examination, that the editorial department was isolated at the end of the second floor and that the only point of contact with other employees in other departments would be in the coffee room or washrooms. On further examination, however, he admitted that editorial department employees *do*, and *must*, interact

with employees in other departments and, on cross-examination, he said that "my department is the cross-roads for the whole magazine". That comment is both candid and revealing.

35. No doubt a number of editorial department employees do perform certain functions which, in some respects, are different from those performed by employees in other departments, and the editorial department is an established subdivision of the employer's organization. But the suggestion that the editorial department employees work entirely independently from employees in other departments, is simply not borne out by the evidence.

36. Obviously, the employees in the editorial department do not spend significant amounts of their working day chatting with employees in other departments about work-related problems. They do their own work. However, the production of the magazine, on time, requires the co-ordinated efforts of employees in all departments. Without specific evidence to put Professor Rupert's general comments in perspective, it is difficult to say whether the degree of interaction is greater or less than that which one would find in a daily newspaper, but, in this Board's experience, it does not seem to be much different from that of departments in other commercial or industrial establishments. Superficially, at least, the professors in a university department (mentioned by Professor Rupert in his testimony), or the technical employees in a specialized hospital department would have a stronger claim to an independent identity than the editorial department employees here. (In this regard see the general comments of the Board in the *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266; *Kidd Creek Mines Limited*, [1984] OLRB Rep. March 481 and [1986] OLRB Rep. June 736, and more recently, *The Board of Education for the City of Toronto*, [1986] OLRB Rep. June 900).

37. At its most basic level, interaction between the advertising, editorial and production services departments is absolutely essential because the former two departments both fill space in the magazine and the production personnel are concerned with getting the material in the appropriate form for transmission to the printer on time. Unlike a daily newspaper, TV Guide is much less finely tuned or dependent upon local advertising. TV Guide ads are often sold far ahead so that there are pre-established space requirements, and sometimes the advertising sales efforts and the editorial content are specifically linked. As an example, Mr. Larone indicated that the magazine might plan a food story with the "backdrop" of the Dallas cast having fun at a barbecue. The salesman would then use this proposed story as part of their "pitch" to persuade a company such as Kraft or General Foods to buy space. Similarly, the promotion department may develop contests (such as giving readers the opportunity to "win a Fierro this week") which have to be appropriately announced and displayed on the cover or pages of the magazine.

38. It is not simply a matter of editorial employees writing around blocks of space filled by advertising. The advertising material must be properly juxtaposed with the text - particularly the programme listings, times, and TV stations - or adjusted so as not to create a clash (for example, a liquor ad adjacent to a listing of a documentary on alcohol addiction or an ad such as the one appearing at page 107 of Exhibit 2 entitled "Don't let a friend drink and die"). Juxtaposition is particularly important for the so-called "contra" advertising which appears throughout the book. Contra advertising is a "trade-off" or "exchange in kind" between the magazine and various radio or TV stations. Those stations display their programmes or commentators and the station logo beside particular time slots, and, in return, they provide broadcast time to the magazine to advertise its product. Such ads are sprinkled throughout the book and are an important component, but they are the ones most likely to be "killed" because of paging limits. Such decision, of course, necessarily involves both editorial and advertising personnel.

39. Rod Jamer is the assistant features editor and one of the more highly skilled employees

in the editorial department (the features editor is excluded from the proposed bargaining unit). Jamer has contact on an ongoing basis with the advertising personnel and with production services, the employees who are co-ordinating printing schedules and are on the same floor as the editorial department. There is ongoing discussion of when certain pages or books will close. The promotion employees may also come to Jamer to ask for his upcoming line-ups so they can do specific press releases knowing the articles to which they will relate. The various "co-ordinators" have an ongoing relationship with employees outside the department since they are working towards deadlines and they must be aware of press schedules and the activities of the production services employees. Similarly, the art employees in the editorial department have contact with typesetting and production services.

40. The editions co-ordinator is also concerned with budgets and book size which brings her into contact with the advertising department, the production services department and the promotion department. She is involved with estimating and planning ad content, promotion content etc., and this involves cost estimation (depending upon book size) and "book modelling" with the production services department to see if changes in design will have cost implications. There may even be some contact with circulation because station penetrations vary geographically and so must the weighting of programme information. Barbara Bruner, the "editorial business manager" interacts with the finance department and also works during the planning period with the advertising department to develop sales estimates which, in turn, influence page and book sizes. The screening room in the editorial department is used by text writers, columnists and assistant editors, as well as "outsiders" from the promotion department who review advertising videos which they prepare for distribution to TV stations. The magazine's public relations director appears on television to talk about television and regularly obtains his information from the editorial department. And at the managerial level, of course, there must be close co-ordination between the various departments since the amount and balance of editorial and advertising content influences book size, cost and profitability.

41. We need not multiply the examples. Some of the employees in the editorial department have skills or perform work which is different from that performed by some employees in other departments (but not so different from that performed by the editorial department of Canadian Living). But the same could be said for almost any employees in almost any department in almost any public or private enterprise. Moreover, although some of the functions of some of the editorial department employees may be different from the functions performed by other employees in other departments, those functions are not performed in a vacuum. The editorial department is and must be functionally integrated with the rest of the magazine. The impact of technology is always difficult to predict, but we do not think that the introduction of the more sophisticated computer equipment and video display terminals planned by the company is likely to reduce the degree of integration or interaction between employees in the various departments of the magazine.

42. It became apparent at the outset of these proceedings that the union's final argument would turn, at least in part, upon its existing organizing practices, and the established bargaining structure in the newspaper industry. Several of the witnesses addressed those matters.

IV

43. Since the nineteenth century, the newspaper industry has been the preserve of "craft" unions - employees such as pressmen, lithographers, typographers, stereotypers, or photo engravers who formed unions on the basis of their particular trade skills and claimed exclusive jurisdiction over the work which they customarily performed. Because these employees were usually found in particular departments, their craft bargaining units came to be associated with those departments.

Collective bargaining preceded collective bargaining legislation, and when regulatory legislation was eventually passed, labour relations boards, when fashioning bargaining units, tended to honour the established practice. Indeed, in Ontario, section 6(3) of the Act requires the Board to do so.

44. The result was a collective bargaining pattern characterized by multi-unionism, fragmentation, and occasional inter-union rivalry as technological change and the exigencies of the market place assaulted the trade barriers which the craft unions had erected to protect their work jurisdictions. In recent years, such assaults have accelerated. Advances in technology have significantly undermined the position of workers who were formerly among the "aristocrats of labour". Today, a highspeed photo composition device can produce up to one thousand lines per minute as compared to seven lines per minute on an old linotype machine, and the "cold-type" technology of computers and video display terminals permits the editorial staff to do much of the work formerly done by craftsmen in other departments. With the demise of these traditional crafts and the blurring of craft lines has come a wave of union mergers. (See, for example, Exhibit 34 which traces the history and "family tree" of what is now the Graphic Communications International Union.)

45. The Guild is a newspaper union, but it is not a craft union. It was founded in the 1930's on an industrial model, and has, as one of its objects, the promotion of industrial unionism in the newspaper industry. While its constitution does not specifically say so, it is agreed that the Guild's ideal would be one "industrial" trade union representing all employees in newspapers. Since 1973, the International Typographical Union ("ITU") has also advocated an industrial form of union organization although, in the case of the ITU, this position results from the gradual disappearance of its original craft base.

46. Despite the broader parameters of its ideal, the Guild's organizing has typically focussed on employees in departments other than those of the mechanical tradesman already or ordinarily represented by traditional craft unions. Guild members are found in such departments as: editorial, mailroom, circulation, advertising, business office, promotion department, and can include cleaners, cafeteria employees, district sales representatives, etc. The Guild includes journalists, but also large numbers of unskilled or semi-skilled workers. Since 1973 the ITU has sought to expand in the same organizing territory and, to a lesser extent, so has the Teamsters' Union.

47. In the late 1970's and early 1980's there were a series of merger discussions between the guild and the ITU. The ITU is a much larger union. The Guild has only forty five hundred members in Canada while the ITU has about nine thousand. According to Bill McClemen, a Guild official, the ITU has a presence in five hundred and six locations, while the Guild is present in only one hundred. The ITU has forty-six field representatives to the the Guild's twelve. The servicing cost per Guild member is much higher, and for that, and other reasons, there was some interest in merging with the ITU in order to bolster the union's organizing efforts and take advantage of the economies of scale. According to Mr. McClemen, the ITU is the Guild's main competitor, representing employees in the editorial departments of several east coast newspapers, at least one circulation department, editorial and advertising departments in the west, and groups of employees at daily newspapers in Welland, Peterborough, St. Catharines and Sault Ste. Marie. The ITU also represents editorial employees at the Kingston Whig Standard.

48. The Guild's position on bargaining structure is, to say the least, somewhat schizophrenic - perhaps reflecting its recognition of the difference between the unit of employees which is most easily organized and the unit which makes the most collective bargaining sense in the longer term. Bill McClemen testified that it was his preference and that of the union to organize on an all-employee basis. If departments are separately certified, the objective is to combine them. If the

union cannot combine departments, it tries to achieve common expiry dates for their collective agreements and interlocking negotiating committees. The Guild constitution sets out a detailed set of collective bargaining objectives which all local unions are required to advance as part of their local negotiating proposals. One of those objectives is a single collective agreement with standard provisions for all departments.

49. Professor Rupert (who also has considerable organizing experience) confirmed that, in his view, an industrial bargaining unit is the ideal because collective bargaining has a better chance of succeeding but, he said, the Guild has not been able to organize on a broader basis as many other industrial unions have done. He testified that “although we knew that the industrial unit would be more effective, a wall-to-wall unit was not in the cards”. Because multi-unionism was an accomplished fact in the newspaper industry, the Guild found it easier to organize “bit by bit” on a departmental basis; and employers, perhaps familiar with departmental bargaining, did not resist. The employers had learned to live with fragmentation, or decided that a divide and conquer strategy served their collective bargaining interests.

50. The thrust of Professor Rupert’s evidence is also confirmed by John Bryant, a local union official. He, too, indicated that the employees’ collective bargaining interests are better served by a broader bargaining unit, and that even when there are multiple units, the Guild tries to bargain in a consolidated way with the assistance of a single conciliation officer. He said that it is much easier to bargain for several agreements at one time because the union does not need such a large committee and can resolve a number of common issues. It is much more efficient, and common terms and standards enhance the ability of employees to move from one bargaining unit to another. Mr. Bryant admitted that separate units and collective agreements can restrict employee mobility and limit their job horizons. Obviously there may also be difficulties if one pocket of employees decides to go on strike and others are unwilling or not legally entitled to do so.

51. It must be noted, however, that some employers, such as the Toronto Globe & Mail, are apparently prepared to live with whatever benefits or detriments flow from fragmented bargaining. At the Globe, the single multi-department bargaining unit sought by the Guild has been resisted by the employer. In contrast, at the Toronto Star, the Guild unit encompasses some fourteen hundred workers in a number of departments, originally organized separately, which were eventually combined for collective bargaining purposes and covered by one collective agreement. The Guild agreement with the Toronto Star includes such diverse groups as the finance and administration department, the circulation department, the advertising department, the editorial department, the wire photo service and library, the delivery and garage department, the public relations and promotion department, and porters, building cleaners, elevator operators and painters. This is one of the largest Guild units in Canada and, according to Chris Davies, the Toronto Star industrial relations director, the fact that the agreement covers a number of departments makes it much easier to deal with employee concerns, benefits, and such common occurrences as promotions or transfers. However, the Star still has to deal with a number of trade unions and over the years, bargaining patterns have shifted from negotiations with one joint counsel, to separate bargaining with the Guild and a joint counsel, to individual negotiations with each union which may have separate “observers” from sister unions. The current Guild contract expires six or seven months after that of the craft unions and there is currently no joint bargaining with the Guild. According to Mr. Davies, the union mergers in recent years have eased but not resolved the problems of fragmented bargaining. Even for the craft unions which have now merged there remain separate bargaining units and consequent problems with respect to interdepartmental mobility, retraining, job progressions, and the need to accommodate technological change.

52. The evidence of Claude Vaillancourt was concerned primarily with the effect of “com-

puterization" on the newspaper business in general, and the company's publications in particular. Mr. Vaillancourt is the company's director of management information systems. He has had extensive computer experience and has worked, *inter alia*, for the Ottawa Citizen. It was his opinion and experience that the introduction of computerized techniques (which the company is in the process of doing) makes departments work together more closely because they are all "on-line" and become dependent on the same technology and tools - although this does not necessarily mean more face to face contact. As an example, he cited the potential interaction of station editors and the art, promotion and advertising department using the computer and their own video display terminals ("vdts") to compose a page and properly juxtapose editorial and advertising items.

53. As we have already mentioned, it is rather difficult to forecast the impact of technology on the company's organization and work distribution, when that technology has yet to be introduced. However, Mr. Vaillancourt's evidence also included a "vignette" from his experience at the Ottawa Citizen, which illustrates the potential friction between employees in separately organized departments.

54. At the Ottawa Citizen, in accordance with Guild work rules, only an editorial department employee could make changes in the text - even if such changes involved no more than minor corrections. Yet it was efficient to make such last minute typographical changes in the composing room, and, in fact, the composing room had its own vdt, linked to the same data base as the one(s) in editorial. The terminal in the composing room was quite capable of doing the necessary corrections, but the composing department employees were not permitted to make them, and the Guild member from the editorial department was not permitted to use the composing room's equipment. The solution? Install a second, identical "editorial" vdt beside the one already in the composing room, so that neither employee group could complain about the other trespassing on its work jurisdiction.

55. The evidence concerning the union's organizing problems deserves separate mention. Messrs. Rupert, Bryant, and McClemen all testified that if the Guild had to organize on a broader basis (as every other industrial union does) it would not be very successful. Mr. Rupert testified that he agonized about it but never came up with a better approach. Mr. Bryant testified that he did not think that the Guild could organize on an all-employee basis because of the lack of interaction between departments and the resistance of employers. Mr. McClemen said the same thing: the requirement to organize on a broader basis would make it difficult for the Guild to organize at all. Many years ago, large newspapers (such as the Vancouver Sun and Province or the Victorial Times - Colonist) had been organized that way, but it is no longer possible to do so.

56. It is not obvious to this Board why this should be so. There is no evidence to establish that employers in the newspaper industry are more opposed to trade unions than other private sector employers; moreover, as we have already noted, a number of trade unions have had a foothold in that industry for more than a hundred years. Whatever the attitudes of the "press barons" may be, this is not an unorganized industry, nor one which exhibits unique barriers to the establishment of collective bargaining (except, of course, for the barriers imposed by trade unions upon themselves by their internal jurisdictional divisions and disinclination to trespass upon one another's territory). Indeed, in cross-examination, Mr. Bryant quite candidly indicated that the Guild's organizing stance tends to be passive (as in the instant case), waiting for employees to approach the union rather than organizing in an active way. Its proposed unit is shaped by who expresses an immediate interest. As he put it, you "go with what you've got...you can't organize people who don't want to be organized". In the case of TV Guide, there was very little effort to extend the ambit of organizing beyond the confines of the editorial department. When asked why the Guild could not organize on a broader basis in the same way as the steelworkers, auto workers, service employees, or public

employees do, Mr. Bryant replied that these other unions can send in a lot more personnel than the Guild. Thus, it may be that the barriers to organizing envisaged by these union officials are related more to the size and meager resources of the Guild, than the intransigence of employers in the publishing industry or the appetite of employees for collective bargaining.

57. There is no doubt that, over the years, the Guild has often organized on a piecemeal, department by department basis, nor is there any doubt that employers have been prepared to agree to these proposed bargaining units and until *The Spectator*, *supra*, so has the Labour Relations Board. Perhaps, as Professor Rupert suggested, that was because publishers were already accustomed to dealing with a number of unions and one more would not make much difference. Perhaps, as John Bryant suggested, some publishers may see an advantage in a “divide and conquer” strategy or in confining new union organization to the smallest unit possible. Perhaps, as in the case of the Toronto Star, the publishers regard each new Guild unit as manageable because it can, for practical purposes, be effectively plugged into the existing structure. We need not speculate. What is clear is that a fragmented bargaining unit structure is not a recipe for collective bargaining efficiency or stability.

58. What has been the result of this willingness to accept bargaining unit descriptions which, in other contexts, would not be considered appropriate? The result is mixed - as is evident from Exhibit 39 which lists the Guild’s organizing activities in Ontario and other provinces. Exhibit 39 suggests that although it may be easier to organize small groups of employees on a departmental basis, it is not so easy to establish a lasting collective bargaining relationship and that, in the process, there may be considerable turmoil and uncertainty for employer and employees alike. When the maintenance of collective bargaining turns on the wishes of small groups of employees whose composition changes from time to time, then the legal structure supporting those rights will exist, or not, depending upon the wishes of this shifting majority.

59. Let us look at some examples. At the Brantford Expositor the editorial, mailing and circulation, advertising and business departments were certified in 1957. Two years later, the advertising and business departments were “decertified”. In 1978, a new certificate was issued for the circulation department, so presumably bargaining rights for the circulation department had earlier been abandoned. In 1980, only 2 years later those same bargaining rights were terminated. In 1983, there was another circulation department certificate.

60. In 1953, the Guild was certified to represent the employees of the Ottawa Journal working in the circulation and editorial departments. In 1955, an application to the Board resulted in termination of those bargaining rights. In 1959 and 1961 there were new certificates for the circulation and editorial departments. Then, between 1961 and 1966 there was a further editorial “decertification” as well as a “decertification” in the maintenance department. And then, in 1972 there was a new certification in the circulation department (*inter alia*) for part-time workers.

61. At the Sudbury Star in 1973, the union was certified to represent full-time employees in the business, circulation and editorial departments. The circulation department was “decertified” in 1974 and “recertified” in 1977.

62. At the Toronto Globe & Mail there were a series of certificates issued in the 1950’s. In 1959, the advertising department was certified. In 1962, those bargaining rights were terminated. In 1963, the cafeteria was certified but, subsequently, the tasks were “contracted out” and the unit disappeared. In 1963, there was a new certification for the circulation department which had been certified several years earlier but, apparently, had not achieved a collective agreement. In 1977, district sales representatives were certified. In 1979, the bargaining rights were terminated. In

1982, there was a new certificate for district sales representatives. In 1985, there was a new certificate for advertising employees.

63. In the case of certificates granted for the Burlington Gazette (advertising, business, editorial), CCH Limited (editorial), Oshawa This Week (editorial), Peterborough Examiner (editorial), Toronto - Burlington Post (editorial), Toronto Citizen (advertising, business, circulation, editorial), and Toronto Bargain Hunter Press (all office, clerical and technical employees) no collective bargaining relationship was ever established. In the case of the Regina - Saskatchewan Leader Post, the circulation department was certified in 1981 and decertified a year later. In the case of the Saskatoon Star - Phoenix, the editorial department was certified in July of 1975 and decertified in February 1978. The advertising and editorial departments of the Winnipeg Free Press were certified but never got a collective agreement. The advertising and editorial departments of the Winnipeg Tribune were successful in achieving an agreement but the publication folded. The Toronto Star, on the other hand, is a success story, as is the Ottawa Citizen and the Toronto Telegram before it folded.

64. What is evident from Exhibit 39 is that, however easy it may be to organize a newspaper department, it is much more difficult to establish a lasting collective bargaining relationship. It would appear that, in many cases, these small pockets of employees may not be a significant presence at the bargaining table, and where bargaining rights are rooted in the shifting loyalties of small groups of employees, the union's success may be ephemeral. One must always be careful about generalizing from the experience of one, relatively small union, in one industry, however, the number of collective bargaining failures certainly raises a question about the stability and viability of departmental bargaining units even in an industry where there is some precedent for them.

65. Both parties put their own gloss on the evidence and urged the Board to take into account labour relations principles and policy considerations, which, they said, had been established in earlier cases to which we were referred. Accordingly, it may be useful to briefly review some of these cases and the Board's general approach to bargaining unit questions. While none of the cases is precisely "on all fours" with the present one, they do establish the context in which this case should be decided.

The Appropriate Bargaining Unit - General Considerations

66. In *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, the applicant union proposed a bargaining unit consisting of hospital "service workers" (cleaning, housekeeping, laundry, maintenance employees, etc.) who are typically grouped together and distinguished from "technical" or "paramedical" employees who are either unorganized or form their own bargaining unit. The issue was where to draw the line between these "service" and "technical" bargaining units; and, to this extent, it was quite different from the one we face. In *Hospital for Sick Children* there was no problem of potential fragmentation because the disputed employee group would be assigned to one "generic" bargaining unit or the other; whereas in the instant case, the respondent's principal concern is the possibility of future fragmentation if departmental bargaining units are accepted as the norm. No one in *Hospital for Sick Children* was suggesting that a departmental bargaining unit would be appropriate, even though the Board recognized that the employees in different departments (social workers, pharmacists, physiotherapists, etc.) might have distinct work interests because of their different training, outside professional associations or participation in a specialized department. (See the comments at paragraphs 26-28). Nevertheless, although the issue was different in *Hospital for Sick Children*, the Board (which included 2 members of the present panel) took the opportunity to make certain general comments about bargaining unit determination which are equally apposite here:

12. Prior to the passage of collective bargaining legislation in the early 1940's, there was no prescribed mechanism for the acquisition of bargaining rights. If a group of employees sought to form or join a trade union, and if they had sufficient bargaining power, they were able to compel their employer to meet and bargain. However, the only means of achieving recognition was to threaten a strike. A union had no statutory right to bargain on behalf of its members, and no statutory obligation to represent anyone else. Even if a bargain was struck, the agreement was not, in itself, a binding and enforceable contract. Its enforceability depended upon the parties' economic strength.

13. In 1943, borrowing from American experience, the Legislature passed the *Ontario Collective Bargaining Act* (S.O. 1943, c.4). The new legislation provided a process whereby a trade union could become the exclusive bargaining agent for the employees in a "unit of employees...appropriate for the purposes of collective bargaining" which could be an "employer unit, craft unit, plant unit, or a subdivision thereof" (see section 13(5a)). Over the years, that language has not changed very much. Sections 1 and 6 of the present *Labour Relations Act* read (in part) as follows:

6.-(1) Subject to subsection (2), upon an application for certification, the Board shall determine the unit of employees that is appropriate for collective bargaining, but in every case the unit shall consist of more than one employee and the Board may, before determining the unit, conduct a vote of any of the employees of the employer for the purpose of ascertaining the wishes of the employees as to the appropriateness of the unit.

1.-(1) In this Act,

• • •

(b) "bargaining unit" means a unit of employees appropriate for collective bargaining, whether it is an employer unit or a plant unit or a subdivision of either of them.

14. It will be seen that the statutory language has remained basically unchanged for more than four decades, and in the early years it provided the basis for making broad distinctions for bargaining unit purposes between such groups as: "white collar" office and technical employees, and "blue collar" production employees; skilled tradesmen (electricians, plumbers, sheet metal workers, etc.), and unskilled or semi-skilled workers; part-time employees and full-time employees; employees working for an employer in one plant or municipality and employees in another plant or municipality; and so on. However, these fairly simple, and then unexceptional distinctions, do not apply so easily today. Collective bargaining has extended beyond its traditional "blue collar" industrial base, into the public sector and to increasingly sophisticated and diverse job hierarchies. Real life collective bargaining experience has outstripped some of the conventional wisdom and has shown that the collective bargaining system can exhibit quite a variety of structures, which, at one time, parties might have considered unconventional or inappropriate. Ontario Hydro, for example, has a province-wide bargaining unit, encompassing a broad range of employee classifications, and thousands of employees, ranging from unskilled workers to highly trained technicians. A typical municipal "inside workers" (white collar) bargaining unit may include occupations ranging from filing clerks, to computer programmers, economists and planners with a considerable amount of post-secondary or even graduate training [see the Board's decision in *The Regional Municipality of Durham*, Board File 1818-84-R, decision released November 20, 1984]. The Ontario Civil Service bargaining unit contains thousands of employees ranging from clerks and typists to sophisticated scientific and technical personnel - and, incidentally, the staff of a number of provincial psychiatric hospitals (see: *Owen Sound General and Marine Hospital*, [1978] OLRB Rep. May 445, where the Board noted that in the government sector nurses, paramedicals, service employees, and clericals are all in the same unit, even though under the *Labour Relations Act*, they have typically been segregated into separate units). While at one time common opinion and industrial relations practice might have supported fairly rigid (almost "class") divisions between employee groups, modern collective bargaining seems to be able to thrive quite well in many contexts without such rigid distinctions. It is no longer as easy as it once was to say that it is "inappropriate" to group together for collective bargaining purposes, employees with quite diverse skills, education, training, position in the job hierarchy or probable aspirations.

15. Now obviously, the determination of the appropriate bargaining unit has immense practical and tactical significance. The unit determines the constituency within which the union must establish majority support if there is to be any collective bargaining at all. To put it another way, the unit determines the group of employees whose support must be solicited by their fellows if the objective of collective bargaining is to be achieved. A union cannot seek certification solely for those who have opted to join it. It is required by law to establish majority support in what *this Board* determines is an appropriate unit, and that may not be so easy to predict - as the present case indicates. Moreover, to the extent that the contours of the bargaining unit are unclear, there will be uncertainty about precisely how employees should go about organizing themselves in order to conform with what the law may require. There will also be the prospect of litigation, cost, and delay which may prejudice both the applicant union and the employees it seeks to represent (see the remarks of Laskin, J.A. in *Nick Masney Hotels Limited*, (1970) 13 D.L.R. (3d) 289; 70 CLC 14,010; and those of Estey J.A. (as he then was) in *Re Journal Publishing Co. of Ottawa et al.*, and *Ottawa Newspaper Guild et al.* [1977] 1 ACWS 817). Cost and delay will also be of concern to the employer, and to employees whose wages may be temporarily "frozen" by section 79 of the Act even if they are ultimately excluded from the bargaining unit. The situation is exacerbated in the instant case where the bargaining unit is large, and both parties have experienced some difficulty determining the precise perimeter of the unit, and how (if at all) it can be meaningfully and consistently distinguished from the lower levels of employees working nominally (in the employer's terms) in "technical" job classifications.

. . .

17. Given that the definition of the bargaining unit can materially affect the ability of employees to organize, and that uncertainties concerning its contours can provoke costly litigation and potentially prejudicial delay, what then is the purpose of the concept of the "appropriate bargaining unit"? Quite simply, it is an effort to inject a public policy component into the initial shaping of the collective bargaining structure, so as to encourage the practice and procedure of collective bargaining and enhance the likelihood of a more viable and harmonious collective bargaining relationship. That objective is spelled out clearly in the Preamble to the Act. While the requisites for effective collective bargaining cannot always be defined with certainty, may necessitate a balance of competing collective bargaining values, and may, in any event, turn on factors beyond the Board's control, the discretion to frame the "appropriate" bargaining unit during the initial organizing phase provides the Board with an opportunity (albeit perhaps a limited one) to avoid subsequent labour relations problems. Now, of course, this is not necessarily the same thing as minimizing administrative problems for the employer or organizing problems for the union. The structures and policies that promote a maximization of the employer's business interests are not those that will necessarily describe a viable bargaining unit, or the only viable bargaining unit - particularly since those interests may include a desire to avoid collective bargaining altogether, or limit its effectiveness. The employer's administrative structures are relevant in determining the bargaining unit, but they are not necessarily to be taken as the conclusive blue print in deciding what is appropriate. Nor is it a matter of simply giving an applicant union what it wants. It is, as we have noted, a matter of balancing competing considerations, including such factors as: whether the employees have a community of interest having regard to the nature of the work performed, the conditions of employment, and their skills; the employer's administrative structures; the geographic circumstances; the employees' functional coherence, or interdependence or interchange with other employees; the centralization of management authority; the economic advantages to the employer of one unit versus another; the source of work; the right of employees to a measure of self-determination; the degree of employee organization and whether a proposed unit would impede such organization; any likely adverse effects to the parties and the public that might flow from a proposed unit, or from fragmentation of employees into several units, and so on.

Similar views were expressed ten years before in *Ponderosa Steak House (A Division of Foodex Systems Limited)*, [1975] OLRB Rep. Jan. 7:

10. A primary theme set out in the *Labour Relations Act*, and affirmed by the Board, is the principle of freedom of association. The preamble to the Act makes it clear that it is the intention of the Legislature to encourage collective bargaining "between employers and trade unions as the freely designated representatives of employees." More specifically, section 6(1) of the Act

expressly provides that the wishes of the employees as to the appropriateness of the unit are to be considered by the Board. In other words, the Act recognizes that it is desirable that employees be able to organize in a form that corresponds with their own wishes. Given this legislative policy favouring the right of self-organization, the Board must be careful that its determination as to the appropriateness of the bargaining unit has given proper weight to the wishes of the employees. An earlier decision of the Board, *The Board of Education for the City of Toronto*, July OLRB Monthly Report 430, clearly endorses such an approach. In giving due consideration to the wishes of the employees, the Board, in the absence of contrary evidence must assume that their wishes are expressed by the applicant union as the representative of the employees. This point was made by the Board in *Board of Health of the York-Oshawa District Health Unit*, 1969 June OLRB Monthly Report 340.

11. The right of self-organization, however, must at times compete with the need for viable and harmonious collective bargaining. Section 6 of the Act specifically requires the Board to determine, not just a unit of employees, but “the unit of employees that is appropriate for collective bargaining.” In other words, the Board has a responsibility under the Act to create a rational and viable collective bargaining structure, even though the exercise of this responsibility may sometimes conflict with the right of self-organization. This responsibility was recognized by the Board in the *McMaster University* case, 1973, February OLRB Monthly Report 103, and in the *Board of Education for the City of Toronto* case, *supra*.

12. The determination of what constitutes a viable collective bargaining structure requires the Board to consider matters of industrial relations policy, such as community of interest and fragmentation of employees. Community of interest may be a requisite for viable collective bargaining, since the representation of disparate employee groups by one bargaining agent may put impossible strains upon it as it performs its role in the bargaining process. At the other extreme, a too narrow definition of community of interest may create undue fragmentation of employees, leading to a weak employee presence at the bargaining table, or the possibility of jurisdictional disputes among competing bargaining groups. It should be observed, however, that the Act does not create any presumption in favour of the most comprehensive unit of employees, even though these employees may have a community of interest. Section 1(1)(b) of the Act states that: “‘bargaining unit’ means a unit of employees appropriate for collective bargaining, whether it is an employer unit or a plant unit or a subdivision of either of them.” This provision makes it quite clear that the determination of appropriateness does not always lead to the conclusion that the most comprehensive unit is also the most appropriate unit. Consideration of the wishes of employees, and of industrial relations policy, may very well dictate that a smaller bargaining unit is the appropriate unit. This point was clearly made in *Board of Education for the City of Toronto* case, *supra*.

These comments illustrate a recurring theme in the Board’s jurisprudence: how to reconcile the employees’ right of self-organization (which may suggest a narrowly-defined bargaining unit which is relatively easy to organize), with the need for a rational and viable collective bargaining structure which will minimize labour relations problems in the long run.

67. In *Kidd Creek Mines Ltd.*, [1984] OLRB Rep. March 481 and [1986] OLRB Rep. June 736, the Board reviewed the potential collective bargaining consequences of a bargaining unit defined too broadly or too narrowly. In that case, the applicant union was seeking to represent a unit composed of approximately 100 certified electricians who were part of an industrial work force of 2,800, all of whom were unorganized. The Board said this:

50. We may begin by observing that the notion of an “appropriate” bargaining unit is a labour relations concept with no common law antecedents and in the general case, no precise statutory definition. What it means, quite simply, is the group of employees whom it makes “labour relations sense” to lump together for the purpose of collective bargaining, and section 6(1) of the Act leaves the Board’s discretion to fashion bargaining units largely unfettered. Yet the Board’s determination is obviously of immense practical importance, not only for the immediate parties, but for the structure and performance of the collective bargaining system as a whole. The definition of the unit affects the bargaining power of the union and the point of balance it creates with that of the employer. It influences the potential scope and effectiveness of collective bargaining

for dealing with different matters, and to some extent, even the substantive issues covered in the collective agreement. And, perhaps most important, the shape of the bargaining unit can profoundly influence the potential for industrial peace or collective bargaining discord. The more disparate are the interests enclosed within the unit, the more difficult it may be for the union to effectively represent the collectivity. Insufficient attention to these special interests generates internal strife, while too much attention to minorities may make it more difficult for a union to formulate a coherent package of proposals or make necessary concessions. On the other hand, there are dangers at the other extreme, as the Board noted in *Besview Holdings Limited*, [1983] OLRB Rep. Aug. 1250:

28. Self-determination and community of interest often favour relatively small units, but these are not the only relevant factors in bargaining unit design. The Board must also strive to create a viable structure for ongoing collective bargaining and, to this end, undue fragmentation must be avoided. Consolidated bargaining offers several advantages over a fragmented structure. A proliferation of small units may result in unnecessary work stoppages. Each time one group goes on strike, other employees performing jobs that are functionally dependent upon the work normally done by strikers are brought to a halt. Even in the absence of functional integration, strikers may erect picket lines that keep other employees away from work. The likelihood of a strike occurring increases as the number of rounds of bargaining grows, and is further enhanced by competition among bargaining agents. Secondly, each of several units typically becomes a separate seniority district, enclosed by walls which impede the movement of employees between jobs. In addition, broader-based structures may lower the cost and thereby increase the availability of insurance schemes and benefit plans. A multiplicity of bargaining units also inevitably spawns jurisdictional disputes over the assignment of work and entails the cost of negotiating and applying several collective agreements. Finally, the existence of a single bargaining unit facilitates equitable treatment of employees doing similar jobs.

A patchwork quilt of bargaining units is a recipe for industrial unrest - if only because in an integrated enterprise it takes only one collective bargaining breakdown to start the whole system unravelling.

Again, the Board was saying nothing new. Precisely a year before in *Board of Governors of Ryerson Polytechnical Institute*, [1984] OLRB Rep. Feb. 371, a panel of the Board observed:

13. The concept of a bargaining unit performs two quite distinct functions in labour relations law. In order to be certified, a trade union must enjoy the support of a majority of employees in a bargaining unit. The unit serves as an electoral district in this setting. After a union is certified, the bargaining unit found by the Board to be appropriate strongly influences the conduct of collective bargaining. Although the parties sometimes vary this unit description, it is frequently simply reproduced in the recognition clause in a collective agreement.

14. A trade union may experience insurmountable difficulties in trying to organize employees in a unit that is broadly defined to embrace employees who are geographically dispersed or perform substantially different jobs. As one of the fundamental objectives of the *Labour Relations Act* is to assist employees to join together for collective bargaining, this Board has been reluctant to establish units which are so broadly based that they defy organization. See *Ponderosa Steak House*, [1975] OLRB Rep. Jan. 7. The public policy of facilitating organization is a two-edged sword. A trade union may propose a unit defined so as to leave unrepresented a group so small that they have no real chance of entering the world of collective bargaining alone. In these circumstances, the Board expands the proposed unit to include the employees in question, even though the result may be to dilute support for the union to the point that the application is dismissed. See *Board of Education for the City of North York*, [1982] OLRB Rep. June 918 at paragraph 7.

15. Organizational concerns are not the only forces that shape bargaining units. The Board must also strive to create a viable structure for ongoing collective bargaining. See *Usarco Limited*, [1967] OLRB Rep. Sept. 526; *K Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250; and

Insurance Corporation of British Columbia, [1974] 1 CLRBR 403 (B.C.). From this perspective, a broadly based bargaining unit offers several advantages over a fragmented structure.

16. A proliferation of bargaining units increases the risk of unnecessary work stoppages. The likelihood of a strike occurring grows with the number of rounds of negotiations and may be further increased by competitive bargaining between two trade unions. The potential for mischief is greatest when the work performed in two or more units is integrated. In these circumstances, whenever one group strikes, other employees who are functionally dependent upon struck work are deprived of employment, though they may stand to gain nothing from the strike because their agreement has just been renewed. Even in the absence of functional integration, strikers may erect picket lines that keep other employees away from work, although a concerted refusal to cross a picket line, by employees who are not entitled to strike, is an illegal work stoppage.

17. There are other drawbacks to a multiplicity of bargaining units. Each unit is likely to become an enclave surrounded by legal barriers - designed to enhance the job opportunities of employees within the walls - that impede the mobility of employees. Restrictions on mobility may entail significant costs for an employer whose practice is to frequently transfer employees between jobs that fall in different units. In some cases, these barriers may close natural lines of job progression to the detriment of all concerned. A fragmented bargaining structure also inevitably spawns jurisdictional contests over the allocation of work among units, disputes which in the long run benefit no one. And a proliferation of bargaining units entails the time and trouble of negotiating and administering several collective agreements. From the perspective of an employer with centralized control over labour relations, there is an unnecessary duplication of effort. All of these concerns - work stoppages, restricted employee mobility, jurisdictional disputes and administrative costs - favour consolidated bargaining structures, although the force of each vector varies from case to case.

18. But the community of interest among employees may point towards either a broadly based structure or separate bargaining units. In this context, the word interest, in the phrase community of interest, refers to the bargaining objectives of the employees in question. The most important determinate of those objectives is the work performed. Skills and terms and conditions of employment are also relevant, but these factors are largely derived from the nature of work. In deciding whether to include a population of employees in one bargaining unit or to divide them into separate units, the Board has recognized that within a single unit there is a tendency to compress existing differentials in wages, benefits and other work rules. People who perform the same, or substantially similar, work are likely to have similar aspirations concerning terms and conditions of employment. And a strong argument can be made that they ought to be treated in the same way. Equal treatment is fostered by including all such employees in one bargaining unit. Conversely, employees whose jobs differ radically from the work of their fellow employees have a legitimate claim to different terms and conditions of employment. If they are pressed into one large unit, the logic of collective bargaining is bound to erode existing differentials. Those on the short end of the stick not only have a compelling grievance but also may cause disruption. And an employer may experience difficulty in recruiting for jobs in which the terms and conditions of employment are less attractive than elsewhere. Separate bargaining units may alleviate these problems. However, not all differences between jobs are this fundamental. As a single collective agreement permits of some variation in terms and conditions of employment, it can embrace employees whose jobs differ to some degree, without generating undue dissatisfaction. When entertaining an application by a special interest group for a separate bargaining unit, the Board must also bear in mind that these employees would not achieve complete autonomy by winning a separate unit, because it could not be insulated from the forces of pattern bargaining exerted by neighbouring units. The challenge is to decide what differences between jobs are of sufficient magnitude to justify the creation of separate bargaining units, with their attendant disadvantages. In other words, a balance must be struck between the competing considerations that bear upon the creation of a viable bargaining structure.

19. The design of bargaining units becomes even more complex when the focus of attention is expanded to include not only ongoing collective bargaining but also organizational concerns. The optimal unit for long-term bargaining may be larger than the grouping within which a trade union can be reasonably expected to obtain the level of employee support necessary for certification in the short-run. In other words, there is an inherent stress lurking within the concept of an appropriate bargaining unit because it performs two very distinct functions. How has the

Board responded to this industrial relations conundrum? The decision in *K Mart Canada Limited*, *supra*, at paragraphs 18 to 20, provides an apt illustration. The employer operated four stores in one municipality, the union had organized one at which 127 employees worked, and a certificate was granted for this unit. A broader-based structure was rejected, because it might significantly impede access to collective bargaining. However, the Board suggested it would have been "hard pressed" not to certify a municipal unit if the union had organized all four stores, suggesting a consolidated structure would lead to more effective collective bargaining than several smaller units. In other words, the viability of ongoing collective bargaining was compromised to this extent in order to foster self-determination. But the Board declared that self-determination would not always come out on top. One example used to make this point involved an employer operating fast food outlets at several locations in a municipality and employing at each a substantially smaller number of employees than worked at one K Mart store. The Board strongly hinted that an application for a bargaining unit comprised of one outlet would be rejected.

68. Finally, at the risk of repetition, we must emphasize again, the Board's traditional and continued reluctance to define bargaining units on the basis of employee classifications or employer departments because of the high potential for fragmented bargaining which that creates (see, for example: *Cryovac Division, W.R. Grace & Co. of Canada Limited*, [1981] OLRB Rep. Nov. 1574; *Toronto East General and Orthopaedic Hospital Inc.*, [1981] OLRB Rep. Nov. 1672; *University of Ottawa*, [1981] OLRB Rep. Feb. 232; and *Westeel-Rosco Company Limited*, [1979] OLRB Rep. Nov. 1125). Even in the newspaper industry, where departmental unionization has existed in the extreme, the Board indicated in 1981 in *The Spectator* that it would no longer routinely accept departmental bargaining units which were not demonstrably appropriate. Most recently, in *T. Eaton Company Limited*, [1984] OLRB Rep. May 755 and *Simpson's Limited*, [1984] OLRB Rep. Sept. 1255, the Board repeated that it would not be conducive to orderly collective bargaining to divide up an employer's business into bargaining units based on departments. In the former case, for example, the Board refused to exclude a specialized department from a broader "sales" bargaining unit even though the employees' skills, method of payment and likely career opportunities were somewhat different from those of many of the other salesmen:

6. In the present case, some differences do exist between the sales staff of the Business Centre and those of other departments. But these are differences essentially in degree, and the most distinctive of the Business Centre's working conditions are not without parallels, as discussed above, in some or other of the sales departments already encompassed within the agreed-upon units for this store. Nor does an apparent lack of interest in lateral transfers form a compelling basis for compartmentalized bargaining: the same could be said for many of the technically-skilled and higher-paid departments within an industrial production facility, yet the Board has not viewed as appropriate a proliferation of self-contained skilled-trade or similarly specialized units within a plant. While the question before us in the present application is whether to accede to the request of the employer to allow this one small group to remain outside the broader-based sales unit, viewing the matter from the point of view of its corollary better illustrates the problem. If the 5-man sales unit of the Business Centre is appropriate for exclusion from the broader sales unit now before us, it presumably would also be found appropriate as a self-contained bargaining unit at another store, where *no* other union organizing may yet have taken place. That is not the kind of piecemeal organizing or collective bargaining which the Board would be anxious to foster in this industry. While the needs of the Centre may require certain accommodations, we are not persuaded on the facts that those accommodations cannot be made within the broader context of the varyingly specialized and commissioned/ non-commissioned sales unit.

(See also *Corporation of the City of Barrie*, [1974] OLRB Rep. Nov. 813, at paragraph 8; *Christie, Brown and Company Limited*, [1975] OLRB Rep. March 144 at paragraphs 5-6; *Niagara Regional Health Unit*, [1975] OLRB Rep. April 376 at paragraph 9; *Canadian General Electric*, [1979] OLRB Rep. March 169 at paragraphs 8-9, and cases referred to therein; and *Westeel-Roscoe Company Limited*, [1978] OLRB Rep. Nov. 1125.)

69. These collective bargaining concerns and approaches to bargaining unit determination are not unique to the Ontario jurisdiction. The British Columbia Labour Relations Board has also expressed a decided preference for extended area bargaining and a disinclination to accept, as “appropriate”, bargaining units that are narrowly defined. The leading case is *Insurance Corporation of British Columbia*, [1974] 1 Can LRBR 403. There, after noting, as this Board has done, the inherent tension between the unit which is most easily organized and the unit which makes the most “collective bargaining sense” in the long run, the Board went on to enumerate the following factors in favour of a broader “all-employee” bargaining unit:

The simplest reason favouring one overall unit is *administrative efficiency and convenience* in bargaining. All other things being equal, it is preferable to have only one set of negotiations going on, rather than spreading management efforts among two or three or even more units....A second administrative factor, this one clearly in the interests of both employer and employee, is the matter of *lateral mobility*. The presence of several bargaining units, each with their own seniority lists and different contract benefits, is an obstacle in the way of an employee's transfer or promotion out of the original unit into which he was hired. This limits the mobility of the employee...it also restricts management's range of selection among qualified persons to fill a job....The existence of a single bargaining unit facilitates the achievement of a *common framework of employment conditions* - vacations, statutory holidays, overtime, insurance scheme, pension plan, and so on...another factor favouring a single large unit is the objective of *industrial stability*. If there is one union and one set of negotiations, then the risk of strikes has to be less than if there are several unions negotiating separately. If there are two or more units representing employees in an operation which is functionally integrated, then if one unit goes on strike, it will put the employees in the other unit out of work as well (and even if they have nothing to gain from a strike because they have already signed their agreement)....These virtues of the employer-wide unit are significant, especially when considered cumulatively. However, they are not absolutely compelling. It is common to find certifications granted by this Board where narrower unit boundaries are drawn. The usual reason for that description of the appropriate bargaining unit is the Board's judgement about the *community of interest* of the employees. There is a simple explanation for the importance of this factor. The point of certification under the Code is to secure collective bargaining for the employees. Accordingly, the group on whose behalf this bargaining is to be carried on should include only those categories of employees whose interests can reasonably be reflected in one set of negotiations and whose working conditions can be incorporated into one document. If some groups differ greatly in background, skills, nature of work, method of payment, and so on, it may prove difficult to accommodate their interests in one bargaining unit....In each case, then, the Board must decide whether the distinctive needs of special groupings of employees are strong enough to outweigh the practical arguments in favour of one all-employee bargaining unit...

We agree with this analysis.

70. There are two other cases which are worthy of brief mention: *Canada Trustco Mortgage Company*, [1977] OLRB Rep. June 330, and *K-Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250. In each case, the union sought to represent a bargaining unit of employees working in a particular branch of an employer's multi-branch operation, and, as in the instant case, the employer argued that the appropriate bargaining unit should encompass a much larger group. Neither case involved a departmental subdivision of the enterprise; but, for our purposes, they are significant because they reiterate that in given circumstances, there may be more than one appropriate unit, and that when faced with that situation the Board should not adopt an interpretation of “appropriateness” which, in practical terms, impedes access to collective bargaining altogether. In *Canada Trustco*, the Board put it this way:

27. In determining the appropriate bargaining unit the Board cannot disregard the labour relations realities before it. When a group of employees signify that they wish to exercise their right to bargain collectively, and that grouping is seen by the Board as sufficiently conforming to the Board's criteria of appropriateness as a bargaining unit, this Board should not require bargaining in a more comprehensive unit if to do so would effectively impede the access of that group of

employees to any collective bargaining at all. As was said by the British Columbia Labour Relations Board in *Woodward Stores Vancouver Limited*, [1975] C.L.R.B.R. 114, quoting the earlier *Insurance Corporation of British Columbia (No. 2)* decision of the same Board:

“However, clearly one can’t have collective bargaining at all unless there is a unit in which a majority of employees will select a trade union’s representative. There are certain types of employees who are traditionally difficult to organize and there are some employers who are willing to exploit that fact and stipulate opposition to a representation campaign. If notwithstanding these obstacles, a group of employees within a viable unit wishes to have a union represent them, the Board will exercise its discretion in order to get collective bargaining under way. In that kind of situation, it makes no sense to stick rigidly to a conception of the best bargaining unit in the long term, when the effect of that attitude is to abort the representation effort from the outset.”

71. We do not think it would serve any useful purpose to further clutter these reasons with extensive quotes from earlier Board decisions. We have included these references only to underline the considerations which have consistently influenced the Board over the years, in many industrial contexts, and to emphasize the fact that the departmental bargaining units in the newspaper/publishing industry represent a departure from the norm. Having reviewed this general background, we return to the particular circumstances under review.

Decision

72. Do the circumstances of the editorial department employees demonstrate a unique community of interest warranting a separate bargaining unit? In our view, the answer is no. There is no significant difference in their terms and conditions of employment (hours of work, wages, benefits, etc.) which are similar to those of other TV Guide employees, are established in the same way, and are administered by the same personnel department in accordance with common employer policies. Nor is there anything particularly significant about the employees’ skills or the nature of their work. Some editorial department employees obviously perform functions that are different from those performed by workers in other departments, but that is true of almost any employee in any classification or department in any commercial enterprise, and does not necessarily imply that the target group should comprise a separate collective bargaining unit. Even if “writing” is considered a specialized skill or function, many (and perhaps the majority) of the employees in the editorial department are not “writers”, much of the writing that is done is not particularly sophisticated, and writers may also be found working for Canadian Living and to a lesser extent in the promotion department of TV Guide where the production of promotional material requires a degree of writing and creative ability. There is no significant difference in the employees’ work environment and no reason to infer any differences in their job horizons or collective bargaining aspirations. From a labour relations point of view, they are not an insular grouping within the company’s organization. The fact that there are a number of transfers (or promotions) from one department or magazine to another, merely underlines the artificiality of the distinction that the union urges upon us.

73. The managerial personnel in the editorial department do not operate independently, but rather in consultation with the human resources department and in accordance with established company-wide policies. Far from being an isolated department functioning independently from the others, the editorial department is an integrated part of the respondent’s operation and its employees have regular and necessary contact with employees in other departments in order to meet the magazine’s publishing objectives. Such contact is facilitated by the physical layout of the building and the geographic proximity of one department to another. There is no obvious functional or labour relations basis for creating a bargaining unit confined to a part of a floor, so that crossing an aisle or opening a door would take one into a different legal and collective bargaining regime.

There is, of course, no history of collective bargaining at TV Guide and no precedent for dividing its employees into collective bargaining units along departmental lines. Neither is there an established pattern of departmental bargaining in other magazines.

74. Not only does the evidence fail to establish a unique community of interest for the editorial department employees, but there is nothing to suggest that such departmental bargaining unit would be immune from the kinds of employment relations problems adverted to in the Board's jurisprudence. Chris Davies indicated that even at the Toronto Star, where the Guild has been entrenched for many years and the employer has been content to agree to departmental units, there have been problems of inter-departmental mobility. The evidence of Claude Vaillancourt indicates the kind of problem which can arise when change prompts a redistribution of work or the way that it is performed. It does not take much foresight to envisage the possibility of friction when moving from one department to another (even on the same floor) would entail crossing a boundary separating quite different legal regimes - especially since, at the present time, there is no such potential barrier because the company has common wage, benefit, job posting and other employment policies. The concerns expressed by Mr. Jamer on behalf of the objectors are not academic.

75. Even if those concerns could be accommodated in the long run, one can readily foresee the immediate problems at the bargaining table if a group of employees who do not have unique employment interests demand terms and conditions of employment that are much different from their fellow employees working in other parts of the employer's business. Negotiating a first agreement is difficult enough without this added burden. And quite apart from whether this departmental bargaining unit would be able to conduct a successful strike, one of the reasons why the Board is reluctant to establish departmental bargaining units is the potential for disruption to the employer and other employees when a single department which is part of an integrated operation, opts to engage in industrial conflict. The Board has always held that the "spill over effects" are undesirable and should be avoided, where possible, by drafting a more comprehensive bargaining unit in the first instance (see, for example, the comments in *Ryerson Polytechnical Institute, supra*, at paragraph 16 of that decision and *Insurance Corporation of British Columbia, supra*).

76. The organizing concerns pressed upon us so eloquently by counsel for the union are important ones, and for this reason deserve more specific consideration. Put simply, the proposition is that if collective bargaining is to be extended beyond newspapers to the unorganized parts of the publishing industry, then the Board must be prepared to accept the kind of departmental bargaining units which, in practice, have been the building blocks upon which the Guild has historically relied. It is said that if the Guild had to organize on a broader basis as other unions do, groups of employees interested in collective bargaining would be denied that opportunity. If the "appropriate" unit is defined too broadly, it may be so difficult to organize that, in practice, no collective bargaining unit would be established at all - a result inconsistent with the Preamble to the *Labour Relations Act*.

77. We accept the proposition that the Board should not impose its own notions of the optimum bargaining structure if the concrete result is no collective bargaining at all. But the union's position and the cases it relies on, both require further scrutiny. None of those cases elevate "ease of organizing" to a pre-eminent position. In *K-Mart*, for example, the Board said:

Although the Board must be sensitive to the impact of its bargaining unit determinations upon the ability of trade unions to organize, there are other factors which must also be taken into account. The objectives of the statute relate not only to the promotion of collective bargaining as a means of determining terms and conditions of employment, but also to a recognition of the principle of individual freedom of choice, and to the creation and maintenance of sound and via-

ble bargaining structures. In determining the appropriate bargaining unit, the Board does not give effect to one of these aims to the exclusion of the other. Rather, the task which falls to the Board in the exercise of its discretion under section 6(1) of the Act, requires a balancing of these statutory objectives in the circumstances of each case.

In the same vein, the Board in *Canada Trustco Mortgage Company*, *supra*, the Board acknowledged the union's organizing concerns, but added:

The amenability of the employee grouping for purposes of organization is but one factor among many to be weighed by the Board in the overall determination of appropriateness. Other industrial relations considerations, such as community of interest, fragmentation and ongoing administrative manageability may conflict and ultimately override.

Similarly, the Board in *Ryerson Polytechnical Institute* commented that "organizational concerns are not the only forces that shape bargaining units" and, ten years earlier in *Ponderosa Steak House* indicated that "the right of self-organization, however, must at times compete with the need for viable and harmonious collective bargaining....In other words, the Board has a responsibility under the Act to create a rational and viable collective bargaining structure, even though the exercise of this responsibility may sometimes conflict with the right of self-organization."

78. Let us also consider, for a moment, the facts before the Board in *Canada Trustco* and *K-Mart*.

79. As we have already mentioned, in *Canada Trustco*, the union sought certification for a bargaining unit encompassing only one of many branches of the financial institution. But the particular branch in question was twelve miles from the nearest one. There was no significant interchange of employees from one branch to another. Each branch was operated autonomously, by a separate manager, with local hiring, promotion, and disciplinary decisions. There was no functional coherence or interdependence. In the Board's view, each branch was a:

distinct employment entity not unlike a separate plant in the industrial sphere. All of the employees in that location could be included in a single unit so that the *risks of patchwork bargaining by department would not be present*.

[emphasis added]

That is a far cry from the situation here.

80. *K-Mart* involved an effort to organize one of four retail stores in the Metropolitan Toronto area, and after examining the factors which pointed towards a single store bargaining unit or some broader grouping, the Board did indeed observe that: "Where, as in the department store sector, collective bargaining has not taken a foothold, the Board will lean towards the bargaining structure which best facilitates organization". In that case, however, the stores were geographically separate. Each had its own manager and personnel officer. Hiring was done locally. There was no interchange of employees between stores. Personnel administration was done on a store-by-store basis. Again, the situation here is very different.

81. We do not quarrel with the principles enunciated by the Board in *Canada Trustco* or *K-Mart*, but neither of those cases is similar to the present one, which involves one department of an integrated multi-department enterprise, common terms and conditions of employment, geographic proximity, and employee interchange within the same building. These cases do not support the establishment of departmental bargaining units, and the Board in *Canada Trustco* is quite explicit in saying that its preferred bargaining unit does not involve this particular "mischief".

82. Nor does the evidence before us demonstrate that departmental bargaining units are the key to establishing stable collective bargaining relationships. Quite the contrary. There are a significant number of collective bargaining failures: the inability to achieve a first collective agreement, or a successful “decertification” application following shortly after the establishment of bargaining rights. Indeed, the frequency of such collective bargaining failures and the number of instances where departmental bargaining units, once certified, cease to exist (but may later be certified once again) suggests to us that recognition on a departmental basis frequently leads to a weak presence at the bargaining table, recurring challenges to the union’s position and a generally unstable collective bargaining climate from the point of view of both the employer and the employees. Piecemeal organizing (however easy) leads to piecemeal bargaining which is often unproductive and unsuccessful.

83. Despite the difficulties enumerated by the union (including its own limited resources in comparison with other unions), it is not obvious that broader organizational efforts would be unsuccessful, or that to facilitate employee access to collective bargaining it is necessary to define the bargaining unit in departmental terms. Nor, according to exhibit 39, and the evidence of Mr. Bryant, has the Guild itself done so. It has adopted a “go with what you’ve got” approach, encompassing one or more departments, depending upon the extent of employee interest generated by its campaign. The fact that the Guild may have limited resources to conduct such campaigns is not something that, in our view, we can properly consider in determining the bargaining unit (even though it could possibly explain some of the collective bargaining performance evidenced by exhibit 39). In any case, although parts of the publishing industry remain unorganized, newspapers have been organized in whole or in part for decades. This is not a situation like that addressed by the Board in *K-Mart* or *Canada Trustco* where employer resistance or the inherent difficulties of organizing a number of separate locations meant that if only a broader-based bargaining unit was found to be appropriate, there would be no collective bargaining at all. We agree with the union that self-determination and ease of organization are factors to be considered in determining what bargaining unit is appropriate, however, they are not factors which, in our view, should be given predominant weight in the instant case.

84. What about history? What about the Board’s routine acceptance (prior to the *Spectator*) of the parties’ agreement on departmental bargaining units? What about the established pattern of collective bargaining in the newspaper industry which often continues to exhibit departmental bargaining even for employees who would not be members of a recognized craft? Counsel for the union argues that the Board’s longstanding acceptance of such units and their continuing existence at newspapers such as the *Globe & Mail* establish a pattern from which we should not readily depart. He asks, rhetorically, what better evidence that those units “work” than that the Board accepted them as workable for many years and that many of them do, indeed, maintain their separate identity for bargaining purposes.

85. There are several difficulties with this proposition. In the first place, the evidence indicates that many of these employee groupings do not “work” because they do not encompass a unit which is viable for collective bargaining purposes. That is the thrust of Exhibit 39 which we have already discussed at length. Moreover, in order to overcome the deficiencies of fragmentation, unions and employers have tried to amalgamate units or create broader-based bargaining (such as at the *Toronto Star*) - thereby approximating something that the Board would routinely establish *in the first instance* in virtually every other industry. One of the reasons why collective bargaining “works” at the *Star* is because the Guild represents one big bargaining unit not fifteen or twenty separate ones.

86. More important, is the fact that, in large measure, the existing pattern of departmental

bargaining units (where it continues to exist) was based on the agreement of the parties, frequently given in circumstances where there was already a multiplicity of bargaining units defined along craft lines. There is no such agreement here. There is no pre-established pattern of fragmented bargaining in the employer's business or in the magazine industry. And the evidence is that craft unions and craft units are becoming increasingly obsolete. That is why there have been so many union mergers in recent years, and that is why the ITU in 1973 changed its constitution so that it could organize on a broader basis. Thus, the union is arguing that we should give effect to organizing patterns which are becoming outdated and which the union itself does not accept as the most appropriate model for organizing. The union's constitution and the evidence of the Guild officials both indicate a strong preference for an industrial (multi-departmental) bargaining unit - and for good reason. Anything less than that is a decidedly "second best solution" that has caused problems and has not proved to be very successful in the past.

87. Since the *Spectator* there has been no general retreat from the concerns expressed in that case. In *Peterborough Examiner*, [1982] OLRB Rep. March 432, it was the union (the ITU) which initially sought an "all-employee" unit and the employer which demanded bargaining units segregated by department. There were already in place two existing bargaining units of "press-men" and "composing room employees". The evidence does not indicate the facts of the employees' relationship, but the Board ultimately decided to reject the employer's position and certify a consolidated unit of office and clerical employees, and a separate unit of editorial department employees. In *Welland Evening Tribune*, [1982] OLRB Rep. March 513, the ITU again applied for a broader-based bargaining unit and the employer sought a narrower one. The Board held that it should take an "open and pragmatic attitude to the rationalizing of bargaining structures in the newspaper industry", and after canvassing the wishes of the employees found a comprehensive bargaining unit to be appropriate. In the *Sault Star, a Division of Southam Inc.*, [1983] OLRB Rep. June 980, there were already four bargaining units in the employer's enterprise and "both parties expressed satisfaction with the viability and workability of the proposed [departmental] bargaining unit". There was no interchange of employees or "lines of progression" between the units and, in the Board's view (with which we agree), the key to the *Spectator* decision is the disagreement of the parties. In the result, the Board accepted the agreed-upon bargaining unit. Thus, in each of these cases there was either an existing pattern of departmental units or the agreement of the parties, or both. In none of them is there any indication of the kind of evidence we have here.

88. Clearly, in any enterprise there may be several possible bargaining unit configurations or degrees of appropriateness. Where the parties have themselves selected a bargaining unit with which they are comfortable, the Board should not lightly intervene and "second-guess" their choice. The very fact of their agreement represents some evidence of a willingness to make the kind of accommodations necessary to make collective bargaining work or, at least, some tolerance for the problems or frictions associated with fragmented bargaining. In the absence of some demonstrable third party or public interest there is simply no reason to disregard the wishes of the parties and precipitate a controversy where there was none before. On the other hand, bargaining units based upon the agreement of the parties will necessarily have less precedential value - especially when there is little detailed information about the context in which such agreements were reached. Here, of course, there is no agreement on the definition of the unit and there is evidence to suggest that the unit which parties often agree to in other circumstances is not "appropriate". There is no established pattern of fragmented, departmental bargaining in this enterprise, or in the magazine industry, and even if newspapers are a close analogy, the Board in the *Spectator, supra*, indicated that in the absence of the agreement of the parties it would be disposed to fashion the bargaining unit in accordance with the usual general principles applied to the particular circumstances of the case. Accordingly, it can come as no surprise to the Guild that, in the absence of the

agreement of the parties, departmental bargaining units are not something which the Board will automatically accept.

89. In summary, then, we do not think that the proposed editorial department bargaining unit is appropriate for collective bargaining. Having regard to such factors as the nature of the work performed, the conditions of employment, the skills of the employees, ease of administration, proximity to other departments and functional coherence and independence, we find that the editorial department employees do not have a separate community of collective bargaining interest, nor do economic factors, the structure of managerial authority, or the source of work dictate a separate bargaining unit. There is no agreement of the parties on the scope of the bargaining unit and to the extent that we have evidence of the wishes of the employees, their views are divided. The established bargaining practice in newspapers may suggest a contrary result, but one must remember that this is not a newspaper and, to the extent that the bargaining pattern among employees typically represented by the Guild represents an extension of a pre-existing framework of multi-unionism and craft bargaining units, the precedent has no application here. We do not think a policy of granting departmental bargaining units is necessary to facilitate organizing in the magazine industry and, against any such inclination we must weigh the real labour relations problems associated with fragmentation outlined above.

90. This is not to say that on the agreement of the parties, or in a newspaper, or where there is a pre-existing pattern of multi-unionism or fragmented bargaining, or where, on balance, the facts clearly warrant it, the Board might not find a departmental bargaining unit to be appropriate. We prefer not to speculate. That is not the situation here. For the purposes of this case, it is sufficient to say that the departmental bargaining unit proposed by the Guild in this case is not appropriate for collective bargaining, and that the appropriate bargaining unit should encompass all employees of TV Guide Inc.

91. The Registrar is directed to relist the matter for further hearing to consider the remaining outstanding issues. This panel is not seized.

DECISION OF BOARD MEMBER B. L. ARMSTRONG;

1. I dissent from the decision of the majority.

2. In my view, the determination of the dispute between the union (which seeks a unit restricted to the editorial department of TV Guide Magazine) and the employer (which proposes a more comprehensive unit) must involve a reconciliation of two concerns. On the one hand, the Board is averse to fragmentation of an employer's work force into several units unless that can be rationally justified. On the other hand, the Board recognizes the employees' right to self-organize and the union's organizing pattern.

3. Although, as a general rule, the Board does not recognize departmental units, for a long time it had recognized that such units are appropriate in the publishing industry (see, for example, *St. Catharines Standard Ltd.*, [1975] OLRB Rep. July 601). In *The Spectator* case, [1981] OLRB Rep. Aug. 1177, the Board indicated that it will no longer be willing to treat the publishing industry any differently in determining appropriate bargaining units. The reasons for this proposed change of Board policy are quoted at paragraph 5 of the majority decision.

4. Nevertheless, the fact remains that since *The Spectator* decision, the Board has certified editorial department units, albeit, mostly on agreement of the parties. (See, *MacLeans Magazine*, [1983] OLRB Rep. March 401.) In *Peterborough Examiner*, [1982] OLRB Rep. March 432, in a disputed case, the Board found separate units appropriate for office, clerical and sales employees

and editorial employees, respectively. The Board held that each group had a sufficient number of employees (the editorial department had 20 employees) to establish its own viable relationship.

5. Therefore, it is not at all clear that, despite the warning in *The Spectator*, the Board has decided for once and for all that departmental units in the publishing industry are inappropriate. Rather, the situation seems to be in a state of uncertainty.

6. On the other hand, the Board has clearly stated that unless there are compelling reasons, it will not depart from the pattern of organizing adopted by the applicant union and its supporters. (*Alltour Marketing Support Services Ltd.*, [1982] OLRB Rep. Oct. 1383.) Moreover, the Board has held that in bargaining unit determinations, it must be sensitive to the ability of the trade union to organize. (*K-Mart Canada Ltd.*, [1981] OLRB Rep. Sept. 1250.) The Board has recognized that where a group of employees signifies a desire to exercise their right to engage in collective bargaining and that group sufficiently conforms to the Board's criteria of appropriateness, the Board should not require a more comprehensive unit, if to do so would impede access to any collective bargaining at all (*Canada Trustco*, [1977] OLRB Rep. June 330). In *K-mart*, *supra*, the Board recognized that determination of the appropriate unit requires the Board to take into account the pattern of organizing and balance that against disruptive effects of fragmentation.

7. In my view, in the case before us the recognition of employee wishes and the union's pattern of organizing clearly override any concerns the Board might have about fragmentation. Historically, in this industry, departmental units have continued to carry on viable collective bargaining relationships. The department in question consists of 42 employees, sufficient in numbers to form a viable unit. In the circumstances, I do not think it is reasonable for the Board to deny the wishes of such a large group to engage in collective bargaining.

8. I would have found the unit sought by the applicant union to be appropriate.

0879-86-R Employees' Association of Euclid (V.M.E.), Applicant, v. VME Equipment of Canada Ltd., Respondent

Certification - Membership Evidence - Trade Union Status - Employees endorsing motion confirming constitution of association - Motion confirming membership only for those employees who supported motion and who had previously applied for membership - Applicant filing documents subsequent to terminal date on behalf of employees confirming membership - Documents not given any weight because signed subsequent to terminal date

BEFORE: Ken Petryshen, Vice-Chairman, and Board Members W. G. Donnelly and D. Patterson.

APPEARANCES: Frank Carere and Seitz Enders for the applicant; Norman MacL. Rogers and Susan Armstrong for the respondent.

DECISION OF THE BOARD; October 14, 1986

1. The name of the respondent is amended to read: "VME Equipment of Canada Ltd."
2. This is an application for certification. The applicant employee organization has never

previously appeared in any proceeding before the Board, and accordingly is required to establish that it is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*. Mr. S. Enders, the vice-president of the applicant, gave evidence concerning its origins.

3. In the early part of 1986, another trade union failed in its effort to organize the respondent's employees and it was this event which prompted some employees to attempt to create their own organization to represent them in collective bargaining. With a view to establishing their own association, Enders and a few other employees obtained information from various sources not here relevant. After canvassing the desires of the majority of the respondent's employees and receiving a positive response, the core group of employees developed an application for membership card and, in May and the early part of June, 1986, employees were approached and asked to sign a card and to make a two dollar payment. Out of a bargaining unit of approximately 240 employees, the core group of employees was able to obtain applications for membership on behalf of 165 employees. Once the campaign to sign members essentially was completed, a draft constitution was prepared and a founding meeting organized.

4. Two meetings of employees were held on June 21, 1986. The first meeting began at 11:00 a.m. and the second one started at 12:30 p.m. We were provided with Minutes of both meetings and Enders testified and we are satisfied that these Minutes reflect in substance what occurred at the meetings. Also filed with the Board by the applicant is a list containing the names of those employees who attended both meetings. Sixty-nine employees were present for the first meeting and sixty-one employees attended the second meeting.

5. At the first meeting, employees were given copies of a draft constitution. There was a discussion concerning the objects and purposes of the Association along with a lengthy discussion concerning the various provisions of the draft constitution. After these discussions, the first meeting concluded with the unanimous carriage of the following motion:

That the employees who had applied and were eligible for membership form and constitute an Association known as Employees Association of Euclid (V.M.E.) and the Constitution annexed to these Minutes be the Constitution of such Association and the objects and purposes of the Association be as set out in the Constitution.

6. The constitution adopted by the employees at the first meeting on June 21st contains proper collective bargaining objectives and provides for the election of officers and the payment of dues. The second meeting on June 21st is referred to in the Minutes of that meeting as the "inaugural meeting of the members of the Employees Association of Euclid ("V.M.E.")". During the course of the second meeting, employees elected officers, unanimously decided to take the necessary steps to certify the Association as the bargaining agent of the employees of VME Equipment of Canada Ltd. and appointed solicitors to act on the Association's behalf. The Minutes of the second meeting indicate that counsel was present.

7. This application was filed with the Board on June 27, 1986. Pursuant to the Board's Rules of Procedure, the Registrar fixed July 10, 1986 as the terminal date. Subsequent to the filing of the application and the terminal date, representatives of the applicant realized that there might be a potential problem with the membership evidence previously filed with the Board. To address this potential problem, documents were prepared and executed by employees which contained the following preamble:

EMPLOYEES ASSOCIATION OF EUCLID (V.M.E.)

THE UNDERSIGNED have read the following documents:

- (a) Minutes of a meeting of employees of V.M.E. Equipment of Canada Ltd. below the rank of supervisor and excluding office staff, dispatchers and part-time employees held at the Victoria Recreational Centre, Victoria Road, Guelph, Ontario, on Saturday, June 21, 1986 at the hour of 11:00 o'clock in the forenoon and the attached Constitution.
- (b) Minutes of an inaugural meeting of the members of Employees Association of Euclid (V.M.E.) held at the Victoria Recreational Centre, Victoria Road, Guelph, Ontario, on Saturday, June 21, 1986 at the hour of 12:30 o'clock in the afternoon.

THE UNDERSIGNED hereby ratify and confirm and adopt the motions as set out in the aforesaid Minutes.

THE UNDERSIGNED hereby ratify and confirm and adopt the Constitution of the Employees Association of Euclid (V.M.E.).

THE UNDERSIGNED hereby ratify and confirm the membership of the undersigned in the Employees Association of Euclid (V.M.E.).

8. The documents referred to above contained the signatures of 141 employees. Enders, who actually witnessed eight of the signatures, testified that when representatives of the applicant circulated the documents, they approached, for the most part, those employees who had previously applied for membership but did not attend the June 21st meetings. It appears that quite a few employees who attended the June 21st meetings also signed a document. The documents were signed by employees between July 14th and July 17th, 1986 and were filed with the Board at the hearing on July 18, 1986.

9. In their able submissions to the Board, counsel focused on the issue of whether employees had been admitted into membership or confirmed their membership subsequent to the adoption of the constitution. Counsel for the applicant argued that all the formalities required to attain the status of a trade union had been met at the completion of the two meetings on June 21st. In particular, counsel submitted that the motion passed at the first meeting on June 21st had the effect of admitting into membership or confirming membership for all those employees who had previously signed an application for membership. Alternatively, counsel argued that the motion at least was confirmation of membership for those employees who were at the first meeting and who previously had signed an application for membership. The documents filed with the Board at the hearing also, counsel argued, provided evidence of confirmation of membership. Counsel for the respondent argued that the membership cards were signed at a time when the applicant did not exist and that the Board did not have before it any evidence sufficient to establish confirmation of membership. Counsel also submitted that the documents filed at the hearing were of little assistance to the applicant since there was an onus on the applicant to prove it was a trade union as of the application date, not the hearing date.

10. The Board must be satisfied that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* which defines a trade union as "an organization of employees formed for purposes that include the regulation of relations between employees and employers ...". In essence, an applicant wishing to prove it is a trade union must satisfy the Board that it is an organization of employees formed for purposes that include labour relations and that it is a viable entity for collective bargaining purposes. Although each case is decided upon its own facts, the Board has indicated in a number of cases a series of steps which are generally sufficient to establish that a trade union has been brought into existence. Those steps were summarized as follows in *Canteen of Canada Limited*, [1978] OLRB Rep. Sept. 802, at paragraph 14:

- (a) There is a written document (eg., a constitution or charter) which at least defines how membership is obtained; provides for officers or persons to be elected with authority

to act on behalf of the organization; provides for the calling of membership meetings; and includes a statement of purpose which includes the regulating of relations between employees and employers.

- (b) The document is approved by the employees.
- (c) Employees are admitted to membership in accordance with the terms of the document or are confirmed afterwards as members if they join the organization before the document is adopted.
- (d) The document is ratified by the said members.
- (e) Officers or persons to act for the organization are elected in accordance with the constitution.

For an example, see *Local 199 U.A.W. Building Corporation*, [1977] OLRB Rep. July 472.

11. The Board is not unduly technical when it comes to determining whether an applicant has satisfied the above guidelines. In the instant case, there is no dispute that the applicant has complied with most of the steps outlined above in *Canteen of Canada Limited*, *supra*. The only difference between the parties is whether there has been a confirmation of membership subsequent to the formation of the applicant on behalf of those employees who had previously signed applications for membership. As indicated above, the bulk of the membership evidence filed with this application was executed prior to the creation of the applicant on June 21st, 1986 when its constitution was adopted. One of the elements included in the Act's definition of member in section 1(1)(l) is the requirement that a person "has applied for membership in the trade union". Without some confirmation of membership subsequent to the creation of the applicant, the membership applications represent nothing more than applications to join a non-existent entity. In addition, confirmation of membership at the time of or subsequent to the adoption of the constitution is necessary before one can conclude that the employees who signed the applications for membership were agreeing to become contractually bound one to another pursuant to the terms of the constitution. (See, *Associated Hebrew Schools of Toronto*, [1978] OLRB Rep. Sept. 797).

12. In support of his argument that the motion adopted by the applicant at its first meeting on June 21st had the effect of confirming membership on behalf of all those employees who previously signed an application for membership, counsel referred us to some general comments in some of the Board's earlier decisions. The following excerpt from *M. Loeb Limited*, [1962] OLRB Rep. May 69 is representative of the type of comment counsel relied upon:

Where evidence of membership in a trade union submitted in support of an application for certification consists of application cards, signed, and payment of initiation fees, prior to the time that the applicant came into existence as an organization, the Board does not regard such evidence as valid evidence of membership in the absence of other evidence that the alleged members did some other act consistent with membership after the applicant was formed, or in the absence of some motion by the applicant rectifying the membership of persons who applied for membership prior to the applicant being formed. ...

13. We do not agree that the type of general comment set out above in *M. Loeb Limited*, *supra*, supports counsel's argument. When an employee signs an application for membership card, he or she is expressing an individual choice. In determining whether confirmation of membership has occurred, it appears to us one would require some conduct on the part of the employee which also reflects that employee's individual choice. As well, it would be difficult to conclude that an employee has agreed to become bound with other employees by the terms of a constitution without some conduct from the employee confirming membership. An act of an employee voting on a motion at a meeting of employees could satisfy the requirement of confirmation of membership,

depending of course on the wording of the motion. When the Board in *M. Loeb Limited, supra*, makes reference to "some motion by the applicant rectifying the membership of persons ...", it intended that rectification or confirmation would occur for only those employees who supported a particular motion and who previously had applied for membership.

14. We find support for our view that the applicant cannot adopt a motion which would have the effect of confirming membership for those employees who previously signed a membership card and did not vote on the motion at the June 21st meeting in the Board's reasoning in *National Automatic Vending Company Limited*, [1963] OLRB Rep. May 59. In this case, the constitution was adopted at a meeting held on February 12th which was attended by thirty-three employees. All of the applications for membership, which exceeded thirty-three, were signed prior to the meeting of February 12th. At the February 12th meeting, the following resolution was unanimously passed by those in attendance:

RESOLVED that all membership applications submitted to date be and the same are hereby accepted and all the members present at this meeting as well as D. Strachan, Florence Spencer, Marie Daly, Helen Greer, D. Gentle, W. King, Martha Mitchell and M. Strachan, are hereby considered as members in good standing of this Union.

It appears that by means of the above motion the applicant attempted to confirm membership on behalf of the named employees who were not in attendance at the meeting in addition to the thirty-three employees who attended the meeting. The Board found that the applicant was a trade union but in so finding it noted that "the unanimous adoption of the above resolution is sufficient reaffirmation of membership in the applicant union by the thirty-three employees in attendance at the meeting ...". The Board concluded in *National Automatic Vending Company Limited, supra*, that a motion adopted by employees at a meeting could not confirm membership for those employees who did not vote on the motion.

15. We turn now to the issue of whether the employees who attended the first meeting on June 21st confirmed their membership. To reiterate, the employees attending the first meeting on June 21st unanimously endorsed a motion which reads in part that "the employees who had applied and were eligible for membership *form* and *constitute* an Association known as Employees' Association of Euclid (V.M.E.) ..." (emphasis added). The motion makes reference to employees who had applied for membership and indicates that it is these employees as members who will constitute - in other words, make up or compose - the Association. Although this motion is not worded as explicitly as the motion set out above from the *National Automatic Vending Company Limited* case, the unanimous adoption of the motion, in our view, is sufficient evidence of confirmation of membership on behalf of those employees supporting the motion who previously may have signed an application for membership. Accordingly, we are satisfied that there is sufficient evidence of an "organization of employees formed for the purposes that include the regulation of relations between employees and employers ..." for us to find that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* on the date the application was filed with the Board.

16. The Board further finds that all employees of the respondent in the City of Guelph, save and except supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

17. Having proved its status as a trade union, the applicant must still demonstrate that it has sufficient support to warrant either automatic certification or the taking of a representation vote.

Since certification has important consequences for both the trade union and the employees it represents, the Board exercises considerable care in determining whether an applicant union represents the majority of the employees.

18. The great majority of the applications for membership filed in support of this application were signed by employees prior to the coming into existence of the applicant. Since an element of the Act's definition of member includes a person who applied for membership in a trade union and since the applications for membership before us were signed at a time when the applicant was not a trade union, the applications for membership filed by the applicant, standing by themselves, do not constitute valid membership evidence. This is so even though the applications for membership were filed with the Board prior to the terminal date. As indicated above, in order to validate membership evidence executed in this manner, there must be some evidence confirming membership subsequent to the formation of the organization of employees. In deciding the status issue, we found that the act of voting in favour of a particular motion at the first meeting on June 21st amounted to a confirmation of membership on behalf of only those employees who attended the meeting. Even if we assume that all the employees attending this pre-terminal date meeting had previously signed applications for membership, this would only give the applicant membership support on behalf of approximately thirty per cent of the employees in the bargaining unit. Before it can demonstrate sufficient support entitling it to automatic certification or to a representation vote, the applicant must satisfy us that the employees who signed applications for membership and did not attend the meeting on June 21st have confirmed their membership in the applicant.

19. Counsel for the applicant argued that the documents he filed with the Board at the hearing signed by 141 employees constitute confirmation of membership on behalf of those employees who did not attend the June 21st meeting and who previously had signed an application for membership. Counsel submitted that the fact the documents were signed and filed with the Board subsequent to the terminal date should not lead the Board to disregard them. He argued that the evidence confirming membership is not membership evidence and, therefore, the confirmatory act need not occur on or before the terminal date. In the alternative, counsel requested the Board to exercise its discretion in favour of extending the terminal date in order to make the signing of the documents timely.

20. The Board is given a discretion, pursuant to section 103(2)(j) of the Act, to determine the form in which and the time as of which evidence of membership in a trade union shall be presented to the Board on an application for certification. The Board's practice in that regard, insofar as it is material for our purposes, is contained in Rule 73 of the Board's Rules of Procedure which provides that evidence of membership in a trade union must be in writing, signed by the employees and must be filed no later than the terminal date for the application. As indicated previously, the terminal date for this application fixed pursuant to sections 7 and 103(2)(j) of the Act is July 10, 1986. The Board's power to vary the terminal date is set out in section 82(2) of the Rules of Procedure.

21. As of July 10, 1986, the terminal date for this application, we do not have before us valid membership evidence on behalf of the employees who were absent from the June 21st meetings. Since the evidence confirming membership is what purports to give validity to this membership evidence, one cannot treat the confirmatory evidence as a matter separate and apart from the applications for membership. Such confirmatory evidence, therefore, must relate to acts which occur on or before the terminal date. Since the documents filed with the Board were signed subsequent to the terminal date, we are not prepared to give them any weight when determining whether the application for membership before us have been confirmed. It is not necessary for us

to decide whether the confirmatory evidence (the documents) in these circumstances must be in writing and filed with the Board by the terminal date.

22. Although the Board has the power to vary the terminal date pursuant to section 92(2) of the Board's Rules of Procedure, it is a power which must be exercised with due caution in order to ensure that certification applications may be processed and decided expeditiously by the Board. The granting of such an extension has generally been confined to situations in which employees have not been given adequate notice of the application. See for example, *Kilean Lodge Incorporated*, [1977] OLRB Rep. April 240. In the instant case, the issue of adequate notice to employees does not arise. The applicant's request is being made solely for the purpose of correcting a deficiency in membership evidence. On the basis of the evidence before it, the Board is satisfied that it should not exercise its discretion under section 82(2) of the Rules to extend the terminal date.

23. Having regard to the evidence before us, we are not satisfied that at least forty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on July 10, 1986, the terminal date fixed for this application and the date which the Board determines to be the time for the purpose of ascertaining membership under section 7(1) of the Act. In the result, therefore, this application is dismissed. However, the Board is not prepared to exercise its discretion, pursuant to section 103(2)(i) of the Act, to bar a new certification application by the applicant.

1431-86-R; 1432-86-R; 1505-86-U Textile Processors, Service Trades, Health Care, Technical and Professional Employees International Union, Local 351, Applicant, v. **The Westin Hotel**, Respondent, v. Group of Employees, Objectors; Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, Complainant, v. **The Westin Hotel**, Respondent

Certification - Membership Evidence - Practice and Procedure - Original petition stolen prior to terminal date - Whether terminal date should be extended - Registered mail not including Priority Post - Respondent alleging in reply that conduct in 1985 organizing campaign relevant to validity of membership evidence gathered in 1986 campaign - Petition taint theory cannot apply to membership evidence - Rule 71(1) applying to allegations made in a reply - Allegations in reply dismissed as irrelevant

BEFORE: *Patricia Hughes*, Vice-Chairman, and Board Members *G. O. Shamanski* and *H. Kobryn*.

APPEARANCES: *L. Steinberg* and *F. DaSilva* for the applicant/complainant; *Mary Gleason*, *John Coleman* and *Francine Sauroil* for the respondent; *Wayne Tracey* and *Jacqueline Gilles* for the objectors.

DECISION OF THE BOARD; October 15, 1986

1. The applicant union ("the union") in these matters has made an application for certification as the bargaining agent for the full-time employees of the respondent employer, The Westin

Hotel ("The Westin" or "the hotel") (File No. 1431-86-R) and for the part-time employees of The Westin (File No. 1432-86-R). In addition, the union has filed a complaint under section 89 of the *Labour Relations Act* ("the Act") alleging that the hotel has unjustly dismissed one of the hotel's employees who was one of the union's chief organizers (File No. 1505-86-U). These matters were listed to be heard together.

2. The style of cause is hereby amended to change the name of the applicant to "Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351" and to add a "Group of Employees" as objectors. In addition, a representative of the intervener informed the Board that it desired to withdraw its intervention and the Board granted the intervener leave to do so; the style of cause is hereby amended to remove the intervener.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the Act.

4. The hearing into these matters began on September 5, 1986 before a differently constituted panel of the Board and continued before us on September 19, 1986. Prior to the hearing scheduled for September 5, 1986, the parties met with a Labour Relations Officer and settled some of the matters in dispute in the applications for certification with respect to both full-time and part-time employees. However, there remained certain matters outstanding to be addressed by the parties in a full hearing before a panel of the Board.

5. Before us, the parties addressed two preliminary matters. First, the objecting employees request that the Board extend the terminal date for the filing of their statement of desire opposing certification of the union, because an original petition was stolen just prior to the terminal date. Second, the union objects, pursuant to Rule 71 of the Board's Rules of Procedure ("the Rules"), to the allegation by the hotel that the union's organizer, Andre Plouffe, had made "kickbacks" to hotel employees to encourage them to join the union on the basis that the allegation does not establish a *prima facie* case.

6. We gave oral rulings on both preliminary matters, accompanied by brief reasons. We declined to extend the terminal date, not being satisfied that the circumstances of the loss of the petition warrant an extension in light of the significance placed on the terminal date by the Board. We sustained the union's objection with respect to the hotel's allegation respecting "kickbacks" since, in our view, that allegation, which referred to the union's previous unsuccessful 1985 organizing campaign, can have no bearing on the way in which membership evidence in the 1986 campaign was gathered. We declined to apply the "taint" theory which the Board has applied in cases where petitions are filed in certification and termination cases to membership evidence filed by the union. Following the oral rulings, and in accordance with the agreement of the parties, we also announced the count in both certification applications.

7. We hereby confirm those oral rulings and provide written reasons.

8. We note that two statements of desire were filed with the Board. The first was filed on August 26, 1986 and was therefore timely. The second statement of desire was filed with the Board on August 28, 1986 and it is with respect to that document that the extension of the terminal date is an issue. It was agreed by the parties that the issue being addressed by the Board was whether the terminal date, August 27, 1986, should be extended to August 28, 1986, in order to permit the petition sent to the Board by the objecting employees to be considered timely.

9. According to the witness called by the objecting employees, Carry Lamorie, she was

waiting in her car for her boyfriend, Wayne Tracey, one of the chief organizers of the petition, outside the employees' entrance to the hotel (a non-parking area), along with Tracey's three-year old son, Joshua, on the evening of August 26, 1986. While she was parked, two cars parked in front of her and one behind. Tracey came out with the petition which he subsequently left on the dashboard of Lamorie's car while he went back into the hotel to look for an employee he expected to sign the petition. Lamorie waited in the car, playing with Joshua. During a period of approximately fifteen minutes, two men from the car in front of the one directly in front of her separately came to her car window and asked her questions. She did not recognize them, but knew they were together because she had seen them talking. Although the men wanted to know if she had seen employee friends of theirs, the first one declined to name the friend when Lamorie asked (she did not ask the second one). The second one asked her if she knew his friend who worked in the bar next door, named Christian Smith, with a French pronunciation of the first name; she admitted that was a "strange" name. She described the men as "strange" and "unkempt". Yet although it was dark and she had a three-year-old child in the back of the car, and the petition on the dashboard, she left the car doors unlocked and the windows rolled down. During this period, she did not see anyone coming in and out of the hotel or other pedestrian traffic. The second man who approached her asked her about the petition in a manner which indicated he knew at least generally what it was; she told him it was in opposition to the union. While she was turned around, talking to Joshua, the man grabbed the petition, reaching across her body to do so, and both men drove away. A third man saw the event and went with her to call the police; at that time, she left Joshua in the car on his own, with the doors unlocked and windows down. She did not have the name of the witness. When she came out, she saw Andre Plouffe standing beside the car parked behind hers, but did not know if he had driven up behind her prior to the incident, nor, at that time, whether it was his car.

10. The lost petition did not contain all the signatures gathered by the petitioners; some were in the possession of another of the objecting employees who had circulated the petition, Jacqueline Gilles. According to the petitioners, there were about one hundred signatures on the first petition, in total. The petitioners made an effort to replace the lost signatures and, having gathered about ninety-five signatures in total, sent the petition to the Board by Priority Post. It was received by the Board on August 28, 1986, beyond the terminal date, by virtue of Rule 75(1) which states:

Where a document is required to be filed by these Rules, filing shall be deemed to be made,

- (a) at the time it is received by the Board; or
- (b) where it is mailed by registered mail addressed to the Board at its office ... at the time it is mailed.

The requirement that a statement of desire be filed by the terminal date is established by Rule 73(1) which reads in relevant part as follows:

Evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall not be accepted by the Board on an application for certification for a declaration terminating bargaining rights unless the evidence ...

- (b) is filed not later than the terminal date for the application.

11. Counsel for the union called no evidence on this issue, but reserved the right to call evidence with respect to the respondent's allegation that the union was involved in the alleged theft of the petition.

12. The Board has often emphasised the importance of the terminal date to certification

proceedings, the need for “strict compliance” with Rule 73(1)(b) and its resulting reluctance to extend a terminal date: *Addressograph-Multigraph of Canada Limited*, [1968] OLRB Rep. March 1183; also see generally *Famz Foods Limited*, [1985] OLRB Rep. June 857 (although in that case the Board refused to extend the terminal date because of the length of time required for the hearing and because the employees’ wishes had changed, the principles expressed apply here). Counsel for the union referred us to cases in which the Board refused to extend the terminal date even though solicitors’ carelessness had been the cause of late filing. While we do not view the circumstances of this case as completely analogous to cases involving solicitor carelessness, we are persuaded that the petitioners must take some responsibility for the loss of the petition. Lamorie was not an originator of the petition; indeed, she testified she knew little about it. However, her reaction to the events of the evening of August 26th suggests a less than cautious response to an unusual and potentially threatening situation: two strange men bothering her at night, few pedestrians about, if any, at the operative time, and with a three-year-old child in the back of her car, never mind the petition on the dashboard. With respect to the petition, this is particularly so since the second of the men specifically and explicitly asked her questions about the petition; furthermore, although Lamorie did not know this man, she gave him information, albeit minimal, about the petition. However, even if we accept that she feels safe in Ottawa (although she says she now will not trust anyone as she did before this incident) and saw no reason to roll up her windows and lock her door - or even, it appears, to warn off the men - we are concerned that Tracey entrusted the petition to someone who apparently did not appreciate its significance, nor the importance of maintaining the “secrecy” of the petition. Therefore, we decline to extend the terminal date and find that the petition is untimely. (We note that we informed the objecting employees later in the hearing that their petition was in any case not relevant since only thirteen persons signing the petition had also signed membership cards and that number was not sufficient to cast doubt on the level of support received by the union.)

13. Two other aspects of this preliminary matter should be addressed. The objecting employees argued that the reason for the different treatment of registered mail in Rule 75(1) is that registered mail provides proof of when the document was mailed; accordingly, other forms of proof of date of mailing should have the same effect and in this case, proof of mailing on August 27, 1986, the terminal date, exists through slips filled out for Priority Post. While we have sympathy for the position of the objecting employees in this matter, we are bound by Rule 75(1) and are not prepared to interpret “registered mail” to encompass “Priority Post”. Counsel for the employer directed us to Rule 84 which states that “[n]o proceeding under these Rules is invalid by reason of any defect in form or of any technical irregularity”. It is our view that the terminal date, and Rules relating to it, are not technical matters. Furthermore, the need for clear rules and their consistent application requires the Board to make it clear to parties when their documents will be considered filed and when all evidence must reach the Board. The question of the appropriate terminal date is not equivalent to the failure to name the employer on a petition or the failure to designate the section under which a complaint has been made, situations in which amendments are permitted; rather, as pointed out above, it addresses a matter of significance in labour relations: the date at which all parties can be satisfied all evidence must be filed if it is to be considered by the Board.

14. With respect to the second preliminary matter, the respondent alleges in paragraphs 10 and 12 of its Reply that Andre Plouffe, the union’s chief organizer in its 1986 campaign, offered and gave “kickbacks” to employees in exchange for their signing membership cards during the 1985 organizing campaign by the same union at the same hotel; Plouffe was a chief organizer during the 1985 campaign. The Westin contends that this alleged conduct by Plouffe is contrary to sections 3 and 70 of the Act and, if found to be true, should be found by the Board to impugn the membership evidence gathered by the union during its current campaign. There is no similar alle-

gation with regard to the membership evidence in the application now before the Board. Effectively, counsel for the hotel is asking us to treat membership evidence as we do petitions: just as the circumstances of a prior petition may "taint" a subsequent petition, rendering the signatures on the second petition involuntary, so, counsel argues, may the conduct of an organizer in one campaign "taint" the results of the second campaign in which the organizer is involved. Furthermore, counsel submits, the hotel has made other allegations that Plouffe's conduct in the 1986 campaign contravenes sections 3 and 70 of the Act and that the 1985 and 1986 conduct can be held by the Board to evidence a line of conduct by Plouffe which offends the Act. Furthermore, counsel argues, once such conduct has been experienced by employees, they would expect similar conduct in another campaign.

15. Counsel for the union contends that the respondent's allegation does not establish a *prima facie* case and therefore, pursuant to Rule 71 of the Board's Rules of Procedure, the Board should dismiss this allegation without a hearing. He contends that the taint theory cannot realistically apply to the gathering of membership evidence and that even if the Board were to find that Plouffe did offer kickbacks in the 1985 campaign (which the union does not concede), it could not apply that evidence to the current application before it (particularly since all the 1986 membership evidence is fresh evidence).

16. We are of the view that this allegation does not establish a *prima facie* case and therefore dismiss it without a hearing. The "taint" theory is based on certain assumptions which cannot apply to membership evidence. Briefly, a previous petition which was originated, prepared and/or circulated in circumstances under which the employees may perceive that the employer has become aware of the petition and that the knowledge of whoever signs or does not sign the petition may reach the employer, whether directly or indirectly, may be held by the Board to "taint" a subsequent petition. This will not always be the result since the length of the period between the two petitions or the subsequent conduct of the employer, or other factors, may serve to satisfy the Board that the "involuntariness" of the first petition has not carried over to the subsequent petition. However, where the Board finds that it has, its conclusion manifests a concern that once employees perceive the employer to be aware of which employees support the union, or are not prepared to sign a petition against the union, they may fear negative employment consequences (for supporting the union) or may anticipate benefits (for not supporting the union); in either case, the Board will not be satisfied that the employees are signing the petition voluntarily. In such cases, the employer retains a continuous control of the workplace and of the benefits and disadvantages which accrue to the employees; more importantly, the employer is in a position to impose such benefits and disadvantages. This is far different than the role of an organizer in a union certification campaign. It may be that an organizer may "bribe" employees to sign membership cards; but the effect of such a bribe ends there. The organizer does not exercise the control over the employees, through a bribe, as the employer does through its control of the workplace. Accordingly, even if Plouffe had bribed employees in the 1985 campaign, the simple possibility of a bribe in the second could have no effect. An employee would not sign a card in anticipation of a bribe unless it had been directly promised to him or her at the time of signing a card. The basic premise of counsel for the hotel's submission with respect to the relevance of the "kickback" allegation cannot be sustained; furthermore, even if the Board were to find the allegation itself were sustained, we could not discount the 1986 membership evidence on the basis of conduct during the 1985 campaign.

17. Counsel for the hotel submitted that Rule 71(1) does not apply to allegations in a Reply. Rule 71(1) states as follows:

Where an application or complaint does not, in the opinion of the Board, make out a *prima*

facie case for the remedy requested, the Board may dismiss the application or complaint without a hearing and it shall in its decision state the reason for the dismissal.

The wording of Rule 71(1) may be usefully compared to the wording in other Rules. For example, Rule 72, which requires that particulars be filed, refers to “application or complaint or ... any document”; Rule 97 requires a party requesting a hearing to set out certain items “in the application, reply or intervention”. Rule 71 refers only to “application or complaint”. The hotel has made its allegation with respect to Plouffe’s conduct in its reply and has not filed a complaint under section 89.

18. At the hearing, we reserved our decision with respect to the applicability of Rule 71 to allegations made in a reply and based our decision on Rule 86’s direction that “[p]rocedure not prescribed is governed by analogy to these Rules”. In our view, any allegation or charge made by a party against another party must establish a *prima facie* case; Rule 71 makes that clear with respect to complaints and applications; Rule 84 permits us to apply the same requirement to allegations made in a reply. Parties cannot avoid the basic requirements of establishing their case simply by employing the format of a reply to make allegations, thereby avoiding requirements applied to complaints or applications. In any case, the power of the Board under section 106 of the Act to determine its own procedure permits us to place the same requirement on an allegation made in a reply as is imposed on an allegation made in a complaint or application and to dismiss any allegation that is not relevant. In our view, conduct in the 1985 campaign is not relevant to the validity of membership evidence gathered in the 1986 campaign.

19. The parties were agreed that these two matters conclude the preliminary matters to be considered by the Board. The parties further agreed to the Board’s revealing the count.

20. With respect to the certification application for the part-time employees of the respondent, the applicant and respondent were agreed on the bargaining unit. Having regard to the agreement of the parties, the Board finds that “all employees of the respondent in the City of Ottawa regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except Assistant Supervisors, Security Staff, Front Desk Staff, Office and Sales Staff, Concierge, Bell Captain, persons employed as Maitre d’, Head Greeter, Lead Captain, Captain, Lead Banquet Bartender, and employees in bargaining units for which any trade union held bargaining rights as of August 12, 1986”, constitute a unit of employees of the respondent appropriate for collective bargaining. The Board notes the parties’ agreement that persons employed in Discoveries are not employees of the respondent.

21. On the basis of the evidence before us, we are satisfied that less than forty-five per cent of the employees of the respondent in the bargaining unit described in paragraph 20 above, at the time the application was made, were members of the applicant on August 27, 1986, the terminal date fixed for this application and the date which the Board determines under section 103(2)(j) of the Act, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

22. The application for certification with respect to the part-time employees is accordingly dismissed.

23. The Board will not entertain an application for certification with respect to any of the employees of the respondent in the bargaining unit with respect to which this vote was directed within the period of six months from the date hereof.

24. With respect to the application for certification as bargaining agent of the full-time employees of the respondent, the applicant and respondent were agreed on the description of the

bargaining unit. Having regard to the agreement of the parties, the Board finds that "all employees of the respondent in the City of Ottawa, save and except Assistant Supervisors, persons above the rank of Assistant Supervisor, Security Staff, Front Desk Staff, Office and Sales Staff, Concierge, Bell Captain, persons employed as Maitre d', Head Greeter, Lead Captain, Captain, Lead Banquet Bartender, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of August 12, 1986", constitute a unit of employees of the respondent appropriate for collective bargaining. The Board notes the agreement of the parties that persons employed in Discoveries are not employees of the respondent.

25. The applicant has challenged the inclusion of the following three individuals in the bargaining unit under section 1(3)(b) on the basis that they perform managerial functions: D'Arcy McGuire, Nelly Tom-Kee and Wayne Tracey. The respondent takes the position they are properly included in the unit. The Board appoints a Labour Relations Officer to inquire and report back to the Board on the duties and responsibilities of the three disputed individuals.

26. Two hundred and ninety-eight employees were members of the bargaining unit at the time the application was made. The applicant filed one hundred and eighty one combined membership/receipt cards. The statement of desire filed August 28, 1986, is not timely. The statement of desire filed August 26, 1986 contains no signatures of employees who also signed membership cards and therefore is not relevant.

27. Regardless of the status of the three disputed individuals, on the basis of the evidence before us, we are satisfied that more than fifty-five per cent of the employees of the respondent at the time the application was made, were members of the applicant on August 27, 1986, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the Act, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

28. However, this conclusion is subject to the allegations made by the employer with respect to the membership evidence. Where the resolution of the status of disputed individuals cannot affect the determination of membership support, the Board would normally grant interim certification to the applicant pending the resolution of the matters in dispute between the parties. In this case, since one of the matters in dispute relates to the validity of the membership evidence and therefore of the evidence required to determine the applicant's support, no certificate shall issue at this time.

29. The parties are agreed to continuation of this hearing on November 5, 6, 19, 20, 21 and 28, 1986 to deal with all outstanding matters.

30. This panel is not seized with these matters.

31. These matters are referred to the Registrar with respect to scheduling the continuation of this hearing to deal with all outstanding matters.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING SEPTEMBER 1986

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

2674-84-R: Ontario Public Service Employees Union, (Applicant) v. Niagara South Board of Education, (Respondent).

Unit: "all employees of the respondent in the Regional Municipality of Niagara, save and except supervisors, persons above the rank of supervisor, the secretary to the superintendent of Program, the secretary to Business Affairs, the secretary to Special Services and secretary to the Administrative Clerk-Benefits, the Administrative Assistant to the Director of Education, Budget Officer, and persons above the rank of Administrative Assistant, occasional teachers and employees in bargaining units for which any trade union held bargaining rights as of January 3, 1985." (213 employees in unit).

1406-85-R: United Steelworkers of America, (Applicant) v. Trim Trends Canada Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Village of Dundalk, Ontario, save and except supervisors, those above the rank of supervisor, office, clerical and sales staff, and students employed during the school vacation period." (251 employees in unit). (*Having regard to the agreement of the parties*).

1683-85-R: The International Union of Bricklayers and Allied Craftsmen & Local Union 7 Canada, (Applicant) v. Ellis-Don Limited, (Respondent).

Unit #1: "all marble masons, tilayers and terrazzo workers and their apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (13 employees in unit).

Unit #2: "all marble masons, tilayers and terrazzo workers and their apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell and the United Counties of Stormont, Dundas and Glengarry, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (13 employees in unit).

1903-85-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. OE Inc., (Respondent).

Unit: "all employees of the respondent in the Municipality of Ottawa and Carleton save and except supervisors, persons above the rank of supervisor, clerical, office, sales, technical staff and those employees working in the Service Department." (53 employees in unit).

2639-85-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. 608379 Ontario Inc. o/a Fleetwide, (Respondent).

Unit: "all employees of the respondent in Tilbury, Ontario save and except manager, persons above the rank of manager, clerical, office and sales staff, and persons regularly employed for not more than 24 hours per week." (5 employees in unit). (*Having regard to the agreement of the parties*).

2653-85-R: Ontario Public Service Employees Union, (Applicant) v. Huron College, (Respondent) v. Group of Employees, (Objectors).

Unit: "all office, clerical and technical employees of the respondent in London, Ontario, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (35 employees in unit).

3123-85-R: Labourers' International Union of North America, Local 183, (Applicant) v. 518270 Ontario Limited, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in unit).

0390-86-R: Canadian Union of Public Employees, (Applicant) v. The Corporation of the Village of Stirling, (Respondent).

Unit: "all employees of the respondent at Stirling, save and except clerk treasurer, foremen and persons above the rank of clerk treasurer and foreman." (10 employees in unit). (*Having regard to the agreement of the parties*).

0439-86-R: Canadian Union of Public Employees, (Applicant) v. Brantford & District Association for the Mentally Retarded, (Respondent), v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent in the City of Brantford, save and except supervisors, persons above the rank of supervisor, financial officer, executive secretary, head office secretary-receptionist, employees regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (129 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (See: *Applications for Certification Dismissed Subsequent to a Post-Hearing Vote*).

0463-86-R: United Steelworkers of America, (Applicant) v. Tate Access Floors, Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the City of Mississauga, save and except forepersons, persons above the rank of foreperson, office and sales staff and students employed during the school vacation period." (50 employees in unit). (*Having regard to the agreement of the parties*).

0620-86-R: United Steelworkers of America, (Applicant) v. Ivaco Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at its Ivaco Rolling Mills Division in the Township of Longueuil (L'-Orignal), save and except assistant foreman, persons above the rank of assistant foreman, office and clerical staff, sales persons, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, and persons in bargaining units for which any trade union held bargaining rights as of June 2, 1986, being the date of application." (19 employees in unit).

0621-86-R: International Union of Operating Engineers, Local 793, (Applicant) v. Allan G. Cook Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and those employees engaged as truck driv-

ers and construction labourers, save and except non-working foremen and those above the rank of non-working foreman." (15 employees in unit).

0748-86-R: Ontario Public Service Employees Union, (Applicant) v. Lutherwood, (Respondent) v. Group of Employees, (Objectors).

Unit #1: (See: *Applications for Certification Dismissed Subsequent to a Post-Hearing Vote*).

Unit #2: "all employees of the respondent in the Regional Municipality of Waterloo, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except programme supervisors, persons above the rank of programme supervisor and the secretary to the executive director." (62 employees in unit).

0785-86-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, (CAW-CANADA), (Applicant) v. Furst Manufacturing Corporation, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent at Cambridge, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (70 employees in unit).

Unit #2: "all employees of the respondent at Cambridge, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and sales staff." (70 employees in unit).

0864-86-R: Christian Labour Association of Canada, (Applicant) v. Tara Communications Centre Inc., (Respondent).

Unit: "all employees of the respondent employed at and working out of the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor and office staff." (4 employees in unit). (*Having regard to the agreement of the parties*).

0983-86-R: Labourers' International Union of North America, Local 837, (Applicant) v. Niagara Concrete Floors Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

1004-86-R: Southern Ontario Newspaper Guild, Local 87 The Newspaper Guild, CLC, AFL-CIO, (Applicant) v. Harlequin Enterprises Limited, (Respondent).

Unit: "all office and clerical employees of the respondent at its Starways Distributors Division, save and except supervisors, persons above the rank of supervisor, payroll and accounting supervisor, the personal secretary to the president, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (7 employees in unit).

1315-86-R: International Woodworkers of America, (Applicant) v. Wasco Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Shelburne, save and except supervisor, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (37 employees in unit.) (*Having regard to the agreement of the parties*).

1329-86-R: Service Employees International Union, (Applicant) v. Peel Memorial Hospital, (Respondent).

Unit: "all office and clerical employees of the respondent in the City of Brampton save and except supervisors; persons above the rank of supervisor; secretaries to the President, Senior Vice-Presidents, Vice-Presidents, Assistant Vice-Presidents, Director of Personnel and Labour Relations, Medical Chief of Staff, Medical Chiefs of Service, Co-ordinator Occupational Health & Safety; persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period; and persons for whom any trade union held bargaining rights as of July 29, 1986." (122 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1367-86-R: Laundry and Linen Drivers and Industrial Workers Union, Teamsters Local 847, (Applicant) v. Easy Enterprises Inc., (Respondent).

Unit #1: "all employees of the respondent in Concord, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (46 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent in Concord, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff." (15 employees in unit). (*Having regard to the agreement of the parties*).

1380-86-R: Laundry and Linen Drivers and Industrial Workers Union, Teamsters 847, (Applicant) v. Conception Enterprises Inc., (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (14 employees in unit). (*Having regard to the agreement of the parties*).

1389-86-R: United Food & Commercial Workers Union, Local 409, (Applicant) v. EMD Hardware Ltd., (Respondent).

Unit #1: "all employees of the respondent in Dryden, save and except manager, persons above the rank of manager, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (6 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent in Dryden regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except manager and persons above the rank of manager." (4 employees in unit). (*Having regard to the agreement of the parties*).

1393-86-R: United Steelworkers of America, (Applicant) v. Hartford Fibres Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Kingston Township, save and except foremen, persons above the rank of foreman, office and sales staff." (41 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1434-86-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Humpty Dumpty Foods Limited, (Respondent).

Unit: "all employees of the respondent at its warehouse in Ottawa, save and except foremen, persons above the rank of foreman, office, clerical and sales staff and those employees in bargaining units for which any trade union held bargaining rights as of August 12, 1986." (2 employees in unit). (*Having regard to the agreement of the parties*).

1447-86-R: Ontario Public Service Employees Union, (Applicant) v. Double M. M. Janitorial Services Ltd., (Respondent).

Unit: "all employees of the respondent employed at the Ontario Police College, Aylmer, save and except supervisors and those above the rank of supervisor." (15 employees in unit). (*Having regard to the agreement of the parties*).

1459-86-R: Retail, Wholesale and Department Store Union AFL:CIO:CLC, (Applicant) v. Jessel Foods Ltd., (Respondent).

Unit: "all office and clerical employees of the respondent at Timmins, save and except branch manager, persons above the rank of branch manager, salesmen, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (3 employees in unit). (*Having regard to the agreement of the parties*).

1486-86-R: Labourers' International Union of North America, Local 527, (Applicant) v. R. R. Marcel Masonry Limited, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

1497-86-R; 1564-86-R: United Food & Commercial Workers, Local 206, chartered by the United Food and Commercial Workers International Union C.L.C., A.F.L.-C.I.O., (Applicant) v. 552653 Ontario Inc., c.o.b. as "The Altadore Quality Inn", (Respondent).

Unit #1: "all employees of the respondent in the City of Woodstock, save and except supervisors, persons above the rank of supervisor, office staff, chief engineer, chefs, maitre'd and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (24 employees in unit).

Unit #2: "all employees of the respondent in the City of Woodstock, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except, office staff, chief engineer, chefs and maitre'd." (5 employees in unit). (*Having regard to the agreement of the parties*).

1511-86-R: International Union of Operating Engineers, Local 793, (Applicant) v. Denjon Construction Ltd., (Respondent).

Unit: "all employees of the respondent employed at its construction camp in the District of Rainy River, save and except office and clerical employees, survey and engineering staff, supervisors and persons above the rank of supervisor." (3 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1529-86-R: Fraternalite Inter-Provinciale Des Ouvriers En Electricite Inter-Provincial Brotherhood of Electrical Workers, (Applicant) v. 92143 Canada Ltd. c.o.b. as Pace Safety Systems Eastern, (Respondent).

Unit: "all employees of the respondent in the Regional Municipality of Ottawa-Carleton, save and except project co-ordinator, persons above the rank of project co-ordinator, office, clerical and sales staff." (7 employees in unit). (*Having regard to the agreement of the parties*).

1533-86-R: United Brotherhood of Carpenters' & Joiners of America, Local Union 27, (Applicant) v. L.E.M. Renovations Ltd., (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (11 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (11 employees in unit).

1540-86-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (C.A.W.-Canada), (Applicant) v. Lear Siegler Industries Limited, (Respondent).

Unit: "all employees of the respondent in the Town of Whitby, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (220 employees in unit). (*Having regard to the agreement of the parties*).

1561-86-R: United Food and Commercial Workers International Union Local 175, (Applicant) v. Maple Leaf Mills Ltd., (Respondent).

Unit: "all employees of the respondent in Dresden, save and except foremen, persons above the rank of foreman, office and clerical staff." (33 employees in unit). (*Having regard to the agreement of the parties*).

1575-86-R: Labourers' International Union of North America, Local 183, (Applicant) v. Calder Hill Contracting Limited, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

1576-86-R: International Union of Operating Engineers, Local 793, (Applicant) v. Calder Hill Contracting Limited, (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

1585-86-R: Service Employees Union, Local 478, (Applicant) v. E and L Catering, (Respondent).

Unit: "all employees of the respondent at Kapuskasing, Ontario, save and except supervisors and those above the rank of supervisor." (17 employees in unit). (*Having regard to the agreement of the parties*).

1588-86-R: Hotel Employees and Restaurant Employees Union, Local 75, (Applicant) v. 339527 Ontario Limited c.o.b. Bentley's Plus, (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervi-

sors, persons above the rank of supervisor, head chef and office staff.” (6 employees in unit). (*Having regard to the agreement of the parties*).

1617-86-R: Union of Labour Representatives of Ontario, (Applicant) v. Brotherhood of Locomotive Engineers (Ind.), (Respondent).

Unit: “all office and clerical staff of the respondent, save and except Executive Assistant to the Canadian Director and persons above the rank of Executive Assistant to the Canadian Director.” (3 employees in unit). (*Having regard to the agreement of the parties*).

1618-86-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), (Applicant) v. Anti-Friction Enterprises (1985), Limited, (Respondent).

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, those above the rank of foreman, office and sales staff.” (44 employees in unit). (*Having regard to the agreement of the parties*).

1624-86-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 853, (Applicant) v. C & H Fire Suppression Systems Inc., (Respondent).

Unit #1: “all sprinkler fitters and sprinkler fitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all sprinkler fitters and sprinkler fitters’ apprentices in the employ of the respondent in the regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0050-86-R: International Brotherhood of Painters and Allied Trades, Local Union 1891, (Applicant) v. James Pollock Interior Wall & Ceiling Systems Limited, (Respondent).

Unit #1: “all plasterers and plasterers’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit). (*Clarity Note*).

Unit #2: “all plasterers and plasterers’ apprentices in the employ of the respondent in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit). (*Clarity Note*).

Number of names of persons on revised voters’ list		2
Number of persons who cast ballots	2	
Number of ballots marked in favour of applicant		2
Number of ballots marked against applicant		0

0958-86-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (C.A.W. - Canada) (Applicant) v. Viewstar, A Division of GSW Inc., (Respondent) v. Local 1590, International Brotherhood of Electrical Workers, (Intervener).

Unit: “all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff.” (99 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	100
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Number of persons who cast ballots	88	
Number of spoiled ballots		4
Number of ballots marked in favour of applicant		74
Number of ballots marked in favour of intervener		10

1240-86-R: Canadian Paperworkers Union, (Applicant) v. Great West Timber Limited, (Respondent) v. Lumber and Sawmill Workers Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Intervener).

Unit: "all employees of the respondent who are engaged at the sawmill, planing mill, yards, treating plant, dry kiln plant, and/or worksites of the respondent, and any additional plants or mills that may be established in conjunction with the present mills and yard operations." (165 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		178
Number of persons who cast ballots	169	
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list	166	
Number of ballots marked in favour of applicant		101
Number of ballots marked in favour of intervener		65
Ballots segregated and not counted		3

1260-86-R: United Steelworkers of America, (Applicant) v. Wheelabrator Canada Inc., (Respondent) v. Shopmen's Local Union No. 834 of the International Association of Bridge, Structural and Ornamental Iron Workers, (Intervener).

Unit: "all employees of the respondent in Milton, save and except foremen, persons above the rank of foreman, office, clerical and sales staff and employees in bargaining units for which any trade union held bargaining rights as of July 22, 1986, being the date of application." (53 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		54
Number of persons who cast ballots	47	
Number of ballots marked in favour of applicant		46
Number of ballots marked in favour of intervener		1

1372-86-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.), (Applicant) v. Standard Products (Canada) Limited, (Respondent) v. P. V. Trim Workers Association, (Intervener).

Unit: "all employees of the respondent at its P. V. Trim Division in the City of Mississauga, save and except forepersons, persons above the rank of foreperson, office and sales staff." (273 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		301
Number of persons who cast ballots	199	
Number of spoiled ballots		5
Number of ballots marked in favour of applicant		188
Number of ballots marked in favour of intervener		6

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

2522-84-R: Ontario Secondary School Teachers' Federation, (Applicant) v. Brant County Board of Education, (Respondent) v. Ontario Public Service Employees Union, (Intervener).

Unit: "all occasional teachers of the respondent in its secondary school panel in the County of Brant, save and except persons covered by subsisting collective agreements." (96 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		80
Number of persons who cast ballots	48	
Number of ballots marked in favour of applicant		39
Number of ballots marked against applicant		9

0439-86-R: Canadian Union of Public Employees, (Applicant) v. Brantford & District Association for the Mentally Retarded, (Respondent) v. Group of Employees, (Objectors).

Unit #1: (See: *Bargaining Agents Certified Without Vote*).

Unit #2: "all employees of the respondent in the City of Brantford regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, financial officer, executive secretary and head office secretary-receptionist." (129 employees in unit). (*Clarity Note*).

Number of names of persons on list as originally prepared by employer		53
Number of names of persons on revised voters' list		65
Number of persons who cast ballots	31	
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list	28	
Number of segregated ballots cast by persons whose name appear on voters' list		3
Number of ballots marked in favour of applicant		22
Number of ballots marked against applicant		6

0872-86-R: Labourers International Union of North America, Local 837, (Applicant) v. Ralph Snelgrove Enterprises (Barrie) Ltd. o/a Westgate Village Apartments, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent working at 30 Bradmon Drive, St. Catharines, Ontario, including resident superintendents, save and except managers and persons above the rank of manager." (2 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		2
Number of persons who cast ballots	2	
Number of ballots marked in favour of applicant		2
Number of ballots marked against applicant		0

1244-86-R: United Food and Commercial Workers International Union, (Applicant) v. Herman Miller Canada, Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the City of Mississauga, Ontario, save and except supervisors, those above the rank of supervisor, office, clerical and sales staff and students employed during the school vacation period." (37 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		42
Number of persons who cast ballots	37	
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list	35	
Number of ballots marked in favour of applicant		23
Number of ballots marked against applicant		2
Ballots segregated and not counted		2

Applications for Certification Dismissed Without Vote

1197-86-R: Labourers' International Union of North America, Local 183, (Applicant) v. Mattamy Homes Ltd., (Respondent) v. Group of Employees, (Objectors). (23 employees in unit).

1268-86-R: Great Lakes Fishermen and Allied Workers' Union, (Applicant) v. Philcox & Elsley Fishery Ltd., (Respondent). (7 employees in unit).

1273-86-R: Great Lakes Fishermen and Allied Workers' Union, (Applicant) v. Rato Fisheries Ltd., (Respondent) v. Jose Rato, (Intervener). (5 employees in unit).

1277-86-R: Great Lakes Fishermen and Allied Workers' Union, (Applicant) v. Saco Fisheries Limited, (Respondent). (18 employees in unit).

1285-86-R: Great Lakes Fishermen and Allied Workers' Union, (Applicant) v. S. Catrini Fisheries Inc., (Respondent). (9 employees in unit).

1289-86-R: Great Lakes Fishermen and Allied Workers' Union, (Applicant) v. Jim Fraser Fisheries Ltd., (Respondent). (9 employees in unit).

1406-86-R: United Garment Workers of America, (Applicant) v. The Ontario Jockey Club, (Respondent) v. Service Employees International Union, Local 204, (Intervener). (13 employees in unit).

1518-86-R: Energy and Chemical Workers' Union, (Applicant) v. K-Line Pharmaceuticals, (Respondent). (16 employees in unit).

1539-86-R: United Brotherhood of Carpenters' & Joiners of America, Local Union 27, (Applicant) v. Daily Star Construction Inc., (Respondent). (3 employees in unit).

1650-86-R: International Union, United Automobile, Aerospace & Agricultural Workers of America, (Applicant) v. Campbell Soup Company Ltd., (Respondent). (322 employees in unit).

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

0935-86-R: United Steelworkers of America, (Applicant) v. Rio Algom Limited, (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, clerical, technical and sales staff and students employed during the school vacation period." (120 employees in unit).

Number of names of persons on revised voters' list	.	116
Number of persons who cast ballots	107	
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list	103	
Number of segregated ballots cast by persons whose name appear on voters' list	4	
Number of ballots marked in favour of applicant		48
Number of ballots marked against applicant		55
Ballots segregated and not counted		4

1337-86-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. Sheldrick's Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Mount Hope, save and except supervisors/foremen, persons above the rank of supervisor/foreman, office, clerical and sales staff." (41 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		39
Number of persons who cast ballots	33	
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list		31
Number of ballots marked in favour of applicant		13
Number of ballots marked against applicant		18
Ballots segregated and not counted		2

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

2568-85-R; 2569-85-R; 2570-85-R: Canadian Brotherhood of Railway, Transport & General Workers, (Applicant) v. Harkness Cartage Company Limited, (Respondent).

Unit: "all employees of the respondent employed at or out of Metropolitan Toronto save and except dispatchers, persons above the rank of dispatcher and office and clerical staff." (36 employees in unit).

Number of names of persons on list as originally prepared by employer	11
Number of persons who cast ballots	6
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	3

0622-86-R: Ontario Public Service Employees Union, (Applicant) v. St. Thomas-Elgin Association for the Mentally Retarded, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at St. Thomas, save and except supervisors, those persons above the rank of supervisor, Executive Director, Secretary to the Executive Director, Secretary to the Executive Director, office and clerical staff, Recreation, Leisure Time and Community Services Co-ordinator, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and persons employed under the Canadian Job Strategy Job Development Program." (76 employees in unit).

Number of names of person on revised voters' list	72
Number of persons who cast ballots	44
Number of ballots marked in favour of applicant	20
Number of ballots marked against applicant	24

0673-86-R: United Food and Commercial Workers International Union, Local 175, (Applicant) v. K Mart Canada Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at its K Mart stores in the City of Belleville, save and except department managers, persons above the rank of department manager, management trainees, pharmacists, students employed during the school vacation period and persons regularly employed for not more than twenty-four (24) hours per week." (56 employees in unit). (*Clarity Note*).

Number of names of persons on revised voters' list	57
Number of persons who cast ballots	57
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list	54
Number of segregated ballots cast by persons whose name appear on voters' list	3
Number of ballots marked in favour of applicant	22
Number of ballots marked against applicant	32
Ballots segregated and not counted	3

0714-86-R: United Steelworkers of America, (Applicant) v. Ivaco Inc., Ivaco Rolling Mills Division and/or Unique Personnel Service and Courier Inc., (Respondents) v. Group of Employees, (Objectors).

Unit: "all employees of Unique Personnel Service and Courier Inc., working at and out of Ivaco Inc. in the Township of Longueuil (L'Orignal), save and except supervisors, persons above the rank of supervisor, office and sales staff." (39 employees in unit).

Number of names of persons on list as originally prepared by employer	39
Number of names of persons on revised voters' list	34
Number of persons who cast ballots	35
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list	33

Number of segregated ballots cast by persons whose name appear on voters' list	1	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		14
Number of ballots marked against applicant		18
Ballots segregated and not counted		2

0748-86-R: Ontario Public Service Employees Union, (Applicant) v. Lutherwood, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent in the Regional Municipality of Waterloo, save and except program supervisors, persons above the rank of program supervisor, employees regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (62 employees in unit).

Number of names of persons on list as originally prepared by employer		42
Number of persons who cast ballots	39	
Number of ballots marked in favour of applicant		16
Number of ballots marked against applicant		19
Ballots segregated and not counted		44

0965-86-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-CANADA), (Applicant) v. Kapco Tool & Die Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Windsor save and except foremen, persons above the rank of foreman, office staff, designers in the engineering department, sales staff, persons regularly employed for not more than (24) hours per week and students employed during the school vacation period." (56 employees in unit).

Number of names of persons on revised voters' list		48
Number of persons who cast ballots	46	
Number of ballots marked in favour of applicant		11
Number of ballots marked against applicant		35

1192-86-R: United Brotherhood of Carpenters and Joiners of America, Local 27, (Applicant) v. Prestige Office Interiors Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent working at and out of the Regional Municipality of York, save and except manager, persons above the rank of manager, office, sales and technical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (27 employees in unit).

Number of names of persons on list as originally prepared by employer		20
Number of persons who cast ballots	18	
Number of ballots marked in favour of applicant		2
Number of ballots marked against applicant		16

Applications for Certification Withdrawn

0236-86-R: Service Employees Union, Local 183, (Applicant) v. Martin Muhr Investments Inc., (Respondent) v. Group of Employees, (Objectors).

0566-86-R: Labourers' International Union of North America, Ontario Provincial District Council, (Applicant) v. Miller Paving Limited, (Respondent).

0862-86-R: Service Employees Union Local 210 Affiliated with Service Employees International Union AFL-CIO-CLC, (Applicant) v. The Corporation of the Town of Warton, (Respondent).

0863-86-R: Christian Labour Association of Canada, (Applicant) v. Tara Communications Centre Inc., (Respondent).

1270-86-R: Great Lakes Fishermen and Allied Workers' Union, (Applicant) v. Salvador Barraco, (Respondent).

1275-86-R: Great Lakes Fishermen and Allied Workers' Union, (Applicant) v. Figueira Fisheries Limited, (Respondent).

1338-86-R: Lumber and Sawmill Workers' Union Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Canadian Construction Controls Ltd., (Respondent).

1358-86-R: Amalgamated Transit Union, Local 1585, (Applicant) v. Corporation of the City of Brampton, (Respondent).

1438-86-R: Service Employees Union Local 268, (Applicant) v. Beacon Hill Lodges (1984) Limited (Office and Clerical), (Respondent).

1471-86-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 46, (Applicant) v. Martec Plumbing Inc., (Respondent).

1517-86-R: United Food & Commercial Workers International Union AFL, CIO-CLC, (Applicant) v. Mirabai Art Glass Ltd./c.o.b. as Xena Designs, (Respondent).

1532-86-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Applicant) v. Fifth Wheel Truck Stop Cornwall Ltd., (Respondent).

1545-86-R: International Union of Operating Engineers, Local 796, (Applicant) v. Arvak Management Inc. (Beaver Foods Ltd.), (Respondent).

1557-86-R: Ontario Public Service Employees Union, (Applicant) v. Wasaga Beach Ambulance Unit, Town of Wasaga Beach, (Respondent).

1584-86-R: Canadian Merchandising Employees' Union, (Applicant) v. Strathaven Nursing Home Limited, (Respondent).

1586-86-R: Canadian Union of Public Employees, (Applicant) v. Huntley Youth Services, (Respondent).

1587-86-R: Labourers' International Union of North America, Local 183, (Applicant) v. Marble Arch Homes, (Respondent).

1600-86-R: Hotels, Clubs, Restaurants & Taverns Employees' Union, Local 261, (Applicant) v. The Skyline Ottawa York Hannover Hotels, (Respondent).

1684-86-R: United Food & Commercial Workers International Union AFL, CIO-CLC, (Applicant) v. Mirabai Art Glass Ltd./c.o.b. as Xena Designs, (Respondent).

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

0919-86-FC: United Brotherhood of Carpenters and Joiners of America, Local 2679, (Applicant) v. Egan Visual Inc., (Respondent). (*Granted*).

0922-86-FC: Communications, Electronic, Electrical, Technical and Salaried Workers of Canada, Local 535, (Applicant) v. Super Plastics Corporation Limited, (Respondent). (*Withdrawn*).

1411-86-FC: International Woodworkers of America, (Applicant) v. Jayden Inc., (Respondent). (*Dismissed*).

1479-86-FC: Sudbury Mine Mill & Smelter Workers Union Local 598, (Applicant) v. Mansour Rockbolting Limited & Mansour Mining Equipment Supply and Repair Inc., (Respondents). (*Granted*).

1495-86-FC: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Lodge 128, (Applicant) v. Teledyne Industries Canada Limited, (Respondent). (*Dismissed*).

1496-86-FCA: United Brotherhood of Carpenters and Joiners of America, Local Union 1030, (Applicant) v. Nepean Roof Truss Limited, (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1813-83-R: International Brotherhood of Electrical Workers, Local 303, (Applicant) v. Twin Electric and Ermac Power & Control Ltd., (Respondents). (*Dismissed*).

0895-85-R: International Brotherhood of Electrical Workers, Local 353, (Applicant) v. Trident Holdings Limited c.o.b. as Trident Electric, Gambin Electric Co. Ltd., Malvin Electric Intercom Systems, and Ashbridge Investments Limited, (Respondents) v. Group of Employees, (Objectors). (*Withdrawn*).

2327-85-R: Michel Campbell, (Applicant) v. Seven-up Pure Spring of Ottawa, A Division of Seven-Up Canada Inc. and Pepsi-Cola Canada Ltd., (Respondents) v. Soft Drink Workers Joint Local Executive Board of Ontario, (Intervener). (*Dismissed*).

3108-85-R: United Brotherhood of Carpenters and Joiners of America, Local 93, (Applicant) v. The Douglas MacDonald Development Corporation, Douglas MacDonald Development Corporation Douglas MacDonald Homes Ltd., Douglas MacDonald Construction Limited and Macand Construction Ltd., (Respondents). (*Withdrawn*).

0477-86-R: United Brotherhood of Carpenters and Joiners of America, Local 1669, (Applicant) v. E.T.S. Towers Inc., Landmark Contracting Ltd. Environmental Technical Services Inc., (Respondent). (*Withdrawn*).

0715-86-R: United Steelworkers of America, (Applicant) v. Ivaco Inc., Ivaco Rolling Mills Division and/or Unique Personnel Service and Courier Inc., (Respondents) v. Group of Employees, (Objectors). (*Withdrawn*).

1507-86-R: United Brotherhood of Carpenters and Joiners of America, Local 27, (Applicant) v. Union Carpentry Contractors and Joiners of America, Local 27, (Applicant) v. Union Carpentry Contractors and Sagata Investments Inc., (Respondents). (*Granted*).

SALE OF A BUSINESS

1813-83-R: International Brotherhood of Electrical Workers, Local 303, (Applicant) v. Twin Electric and Ermac Power & Control Ltd., (Respondents). (*Dismissed*).

0354-85-R: Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. Natyna Enterprises Limited c.o.b. as Rockton Hotel, (Respondent). (*Granted*).

0895-85-R: International Brotherhood of Electrical Workers, Local 353, (Applicant) v. Trident Holdings Limited c.o.b. as Trident Electric, Gambin Electric Co. Ltd., Malvin Electric Intercom Systems, and Ashbridge Investments Limited, (Respondents) v. Group of Employees, (Objectors). (*Withdrawn*).

2326-85-R: Michel Campbell, (Applicant) v. Seven-Up Pure Spring of Ottawa, A Division of Seven-Up Canada Inc. and Pepsi-Cola Canada Ltd., (Respondents) v. Soft Drink Workers Joint Local Executive Board of Ontario, (Intervener). (*Dismissed*).

0406-86-R: International Brotherhood of Electrical Workers, Local Union 1687, (Applicant) v. Northspan

Construction Inc., Corbett Electric Limited, Laurentian Electric (1982) Limited, Semino Inc., Metrocor Limited, (Respondents). (*Granted*).

0478-86-R: United Brotherhood of Carpenters and Joiners of America, Local 1669, (Applicant) v. E.T.S. Towers Inc., Landmark Contracting Ltd. Environmental Technical Services Inc., (Respondent). (*Withdrawn*).

1002-86-R: Retail, Wholesale and Department Store Union, Local 414, (Applicant) v. Woodchester IGA, (Respondent). (*Dismissed*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2449-85-R: Dwayne Wagar, (Applicant) v. Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, (Respondent) v. Fast Service Terminals, (Intervener). (*Dismissed*).

2450-85-R: Floyed Ryan Deschamps, (Applicant) v. United Brotherhood of Carpenters and Joiners of America Local 1030, (Respondent) v. Nepean Roof Truss Ltd., (Intervener). (*Dismissed*).

0335-86-R: Daniel Bowyer, (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 2679, (Respondent) v. Egan Visual Inc., (Intervener).

Unit: "all employees of Egan Visual Inc. employed at its plant at Woodbridge, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (69 employees in unit). (*Dismissed*).

Number of names of persons on revised voters' list		65
Number of persons who cast ballots	63	
Number of ballots marked in favour of respondent		37
Number of ballots marked against respondent		26

0336-86-R: Shirley Keess and Cheryl Da Ponte, (Applicants) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Respondent).

Unit: "all office, clerical and technical employees of Smith & Stone (1982) Inc. at Georgetown, save and except supervisors and foremen, persons above the ranks of supervisor and foreman, nurse, security guards, employees of the Personnel Department, Secretary to the Vice-President and President, persons regularly employed for not more than 24 hours per week and persons covered by the subsisting Collective Agreement between the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and Smith & Stone (1982) Inc." (28 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		25
Number of persons who cast ballots	25	
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list	24	
Number of segregated ballots cast by persons whose name appear on voters' list	1	
Number of ballots marked in favour of respondent		7
Number of ballots marked against respondent		17
Ballots segregated and not counted		1

0355-86-R: Patrick Dale, (Applicant) v. Local 9127 United Steelworkers of America, (Respondent) v. Canadian Timken, Limited, (Intervener) v. Group of Employees, (Objectors).

Unit: "all office, clerical and technical employees at its St. Thomas Plant, save and except assistant supervi-

sors, persons above the rank of assistant supervisor, guards, power plant engineers, technologists, engineers, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, students hired on a cooperative training basis, other persons employed for a definite term or task, employees covered by a subsisting collective agreement, and all employees in the following job classifications: Budget and Cost Analyst, Coordinator-Employee Benefits, Executive Secretary, Industrial Engineering Technical, Industrial Nurse, Personnel Records Clerk, Senior Accounting Clerk, Senior Secretary-Marketing Division, Statistical Clerk." (34 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		33
Number of persons who cast ballots	33	
Number of ballots marked in favour of respondent		15
Number of ballots marked against respondent		18

0589-86-R: Alfred Marsh, (Applicant) v. International Brotherhood of Painters & Allied Trades Local 1891, (Respondent) v. A. J. Bolla Protective Coatings & Decorating Ltd., (Intervener). (1 employee in unit). (*Dismissed*).

0824-86-R: Ann Carr, (Applicant) v. The Association of Employees for the Mentally Handicapped at Countryside, (Respondent). (*Withdrawn*).

0846-86-R: Kevin Gow and Kim McLean, (Applicants) v. Retail, Wholesale & Department Store Union Local 582, (Respondent). (50 employees in unit). (*Withdrawn*).

1184-86-R: Andre O. Forest, (Applicant) v. Labourers International Union of North America Local 1036, (Respondent) v. Inter City Gas Corporation, (Intervener). (7 employees in unit). (*Dismissed*).

1250-86-R: Michel LeBlanc, (Applicant) v. Sudbury Mine Mill Smelter Workers Union Local 598, (Respondent) v. Mansour Rockbolting Limited & Mansour Mining Equipment Supply and Repair Inc., (Intervener). (16 employees in unit). (*Dismissed*).

1263-86-R: James William Andress, (Applicant) v. Office and Professional Employees International Union, Local 343, (Respondent). (5 employees in unit). (*Withdrawn*).

1265-86-R: Wendy J. Wall, (Applicant) v. Retail, Wholesale, Hotel and Restaurant Employees Union and its Local 448, (Respondent). (18 employees in unit). (*Granted*).

1325-86-R: Elaine Parnell, (Applicant) v. O.P.E.I.U. Local 343, (Respondent). (17 employees in unit). (*Withdrawn*).

1499-86-R: Dennis O'Connor, (Applicant) v. International Woodworkers of America, (Respondent). (44 employees in unit). (*Dismissed*).

1524-86-R: Susan Darlene Todd, (Applicant) v. Teamsters Local Union 879, (Respondent). (6 employees in unit). (*Withdrawn*).

1534-86-R: Susan Montgomery, (Applicant) v. Canadian Auto Workers Local 1524, Bruce Davidson, (Respondents). (17 employees in unit). (*Dismissed*).

COMPLAINTS OF UNFAIR LABOUR PRACTICE

3148-84-U: Ontario Public Service Employees Union, (Complainant) v. Cambrian College of Applied Arts and Technology, (Respondent). (*Dismissed*).

3407-84-U: Lawson Blagrove, (Complainant) v. Independent Greeting Card Workers' Union of Canada, (Respondent) v. Carlton Cards Ltd., (Intervener #1) v. Canadian Paperworkers Union, Local 322, (Intervener #2). (*Dismissed*).

0271-85-U: Nestor Duque, (Complainant) v. Local 707 United Auto Workers Union, (Respondent) v. Ford Motor Company of Canada, Limited, (Intervener). (*Dismissed*).

0643-85-U: Southern Ontario Newspaper Guild, Local 87 The Newspaper Guild (CLC-AFL-CIO), (Complainant) v. The Globe and Mail Division of Canada Newspapers Company Limited, (Respondent). (*Dismissed*).

1517-85-U: International Brotherhood of Electrical Workers, Local 353, (Complainant) v. Trident Holdings Limited, c.o.b. as Trident Electric, Gambin Electric Co. Ltd., Malvin Electric Intercom Systems, Raymond DiBattista, Jorge Colussi, Luigi Gialanella, Jim Karry, John Lupo, Robert Marrocco, Devis Nascimben, Mario Perfetti and Dino Tontondonati, (Respondents). (*Withdrawn*).

1978-85-U: Ron Lawrence, (Complainant) v. International Brotherhood of Electrical Workers, Local Union No. 120, (Respondent). (*Dismissed*).

2325-85-U: Michel Campbell, et al., (Complainants) v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, and Soft Drink Workers Joint Local Executive Board of Ontario, (Respondents) v. Seven-up/Pure Spring of Ottawa, A Division of Seven-Up Canada Inc., (Intervener #1) v. Pepsi-Cola Canada Ltd., (Intervener #2). (*Dismissed*).

2361-85-U: United Steelworkers of America, (Complainant) v. Aurora Steel Service Limited, (Respondent). (*Withdrawn*).

2402-85-U: Service Employees Union, Local 210, Affiliated with Service Employees International Union, AFL-CIO-CLC, (Complainant) v. Keytours Inc., (Respondent) v. Group of Employees, (Objectors). (*Withdrawn*).

2517-85-U: Service Employees Union, Local 183, (Complainant) v. Bond's Ambulance/City Ambulance, Picton, (Respondent). (*Withdrawn*).

3102-85-U: Ontario Nurses' Association, (Complainant) v. St. Mary's General Hospital, and Ontario Hospital Association, (Respondents). (*Withdrawn*).

3125-85-U: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Community Web Printing, Division of Houle Printing Ltd., (Respondent). (*Withdrawn*).

0072-86-U: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union Local 351, (Complainant) v. Cadet Uniform Service, (Respondent). (*Withdrawn*).

0405-86-U: Julia McCrea, (Complainant) v. The Municipality of Metropolitan Toronto, (Respondent) v. Canadian Union of Public Employees, Local 79, (Intervener). (*Dismissed*).

0427-86-U: Edward Skrypetz, (Complainant) v. Bruno Teichmann and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 230, (Respondents). (*Dismissed*).

0437-86-U: Service Employees' Union, Local 183, (Complainant) v. Martin Muhr Investments Inc., (Respondent). (*Withdrawn*).

0483-86-U: Vincenzo Salfi, (Complainant) v. Printing Specialties and Paper Products Union Local 688, of the Graphic Communications International Union, (Respondent). (*Withdrawn*).

0561-86-U; 1225-86-U: United Steelworkers of America, (Complainant) v. Chief Industries Inc., (Respondent). (*Granted*).

0638-86-U: Christian Labour Association of Canada, (Complainant) v. Geri-Care Nursing Home of Caressant Care Limited, (Respondent). (*Withdrawn*).

0659-86-U: Labourers' International Union of North America, Ontario Provincial District Council and L.I.U.N.A. Local 607, (Complainant) v. Miller Paving Limited, (Respondent). (*Withdrawn*).

0665-86-U: Giuseppe Cara, (Complainant) v. Ontario Catholic Occasional Teachers' Association (OCOTA), (Respondent) v. Metropolitan Separate School Board, (Intervener). (*Withdrawn*).

0738-86-U: Chief Industries Inc., (Complainant) v. United Steelworkers of America, (Respondent). (*Granted*).

0747-86-U: Julia McCrea, (Complainant) v. Canadian Union of Public Employees Local 79, (Respondent). (*Withdrawn*).

0833-86-U: Service Employees Union, Local 183, (Complainant) v. Martin Muhr Investments Inc., (Respondent). (*Withdrawn*).

0852-86-U: Canadian Union of Operating Engineers and General Workers Local 101, (Complainant) v. Fuel, Bus, Limousine, Petroleum Drivers and Allied Employees Local Union No. 352, (Respondent). (*Withdrawn*).

0854-86-U: Frank Miller, (Complainant) v. Thompson Products Employees' Association, (Respondent). (*Withdrawn*).

0891-86-U: Rocco Morabito, (Complainant) v. CUPE Local 43, (Respondent) v. Corporation of the City of Toronto, (Intervener). (*Dismissed*).

0904-86-U: Union of Bank Employees Local 2104 (Ontario) CLC, (Complainant) v. Heritage Credit Union, (Respondent). (*Withdrawn*).

0914-86-U: Manuel Andrade, (Complainant) v. United Food & Commercial Workers Local 82, (Respondent). (*Dismissed*).

0928-86-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (C.A.W. - Canada) (Complainant) v. Furst Manufacturing Corp., (Respondent). (*Withdrawn*).

0929-86-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (C.A.W. - Canada) (Complainant) v. Furst Manufacturing Corp., (Respondent). (*Withdrawn*).

0930-86-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (C.A.W. - Canada), (Complainant) v. Furst Manufacturing Corp., (Respondent). (*Withdrawn*).

0931-86-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, (C.A.W. - Canada), (Complainant) v. Furst Manufacturing Corp., (Respondent). (*Withdrawn*).

0932-86-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (C.A.W. - Canada), (Complainant) v. Furst Manufacturing Corp., (Respondent). (*Withdrawn*).

0933-86-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (C.A.W. - Canada), (Complainant) v. Furst Manufacturing Corp., (Respondent). (*Withdrawn*).

0934-86-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (C.A.W. - Canada), (Complainant) v. Furst Manufacturing Corp., (Respondent). (*Withdrawn*).

0940-86-U: Lorne Wilhelm, (Complainant) v. The Schneider Employees' Association, (Respondent). (*Withdrawn*).

0953-86-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (C.A.W. - Canada), (Complainant) v. Lear Siegler Industries Ltd., (Respondent). (*Withdrawn*).

0954-86-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (C.A.W. - Canada), (Complainant) v. Furst Manufacturing Corp., (Respondent). (*Withdrawn*).

0973-86-U: United Brotherhood of Carpenters and Joiners of America, Local 2679, (Complainant) v. Member Companies of the Canadian Woodwork Manufacturers Association whose employees are represented by United Brotherhood of Carpenters and Joiners of America, Local Union 2679 including Three J. Display Woodworking Enterprises Ltd., (Respondents). (*Withdrawn*).

0987-86-U: Agostino Fiore, (Complainant) v. U.S.W.A. Local 2251, (Respondent) v. The Algoma Steel Corporation, Limited, (Intervener). (*Withdrawn*).

1000-86-U: Ontario Public Service Employees Union, (Complainant) v. Regional Children's Centre of Thunder Bay, (Respondent). (*Withdrawn*).

1224-86-U: United Steelworkers of America, (Complainant) v. Ken Burgess, (Respondent). (*Granted*).

1245-86-U: Marilyn Delia Bolton, (Complainant) v. Humewood House Association, and The Canadian Union of Public Employees, Local 1717, (Respondents). (*Dismissed*).

1259-86-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (C.A.W. - Canada), (Complainant) v. Furst Manufacturing Corp., (Respondent). (*Withdrawn*).

1304-86-U: Neville Rowe, (Complainant) v. Ontario Store Fixtures, (Respondent). (*Dismissed*).

1305-86-U: United Food and Commercial Workers International Union, (Complainant) v. Seven-Up Toronto, (Respondent). (*Withdrawn*).

1353-86-U: Cdn. Brotherhood of Railway, Transport & General Workers, (Complainant) v. Weiland Ford Sales, (Respondent). (*Withdrawn*).

1354-86-U: Morris Cwik, (Complainant) v. Bakery & Confectionary and Tobacco Workers International Union Local #181, (Respondent). (*Withdrawn*).

1370-86-U: International Woodworkers of America, (Complainant) v. Shelburne Wood Processing, (Respondent). (*Withdrawn*).

1385-86-U: United Steelworkers of America, (Complainant) v. Capital Disposal Equipment Inc., (Respondent). (*Withdrawn*).

1429-86-U: Helen Berezansky, (Complainant) v. The Association of Allied Health Professionals and The Toronto East General Hospital Inc., (Respondent). (*Withdrawn*).

1430-86-U: Patrick J. Woods, (Complainant) v. Paul Manoritou, Local 43 C.U.P.E., (Respondent). (*Withdrawn*).

1443-86-U: Retail, Wholesale and Department Store Union AFL-CIO-CLC, (Complainant) v. Sheldrick's Inc., (Respondent). (*Withdrawn*).

1445-86-U: Ontario Nurses' Association, (Complainant) v. Royal Ottawa Hospital, (Respondent). (*Withdrawn*).

1451-86-U: Panayotis Sigalas, (Complainant) v. United Food & Commercial Workers International Union Local Union 175 & Local Union 633, (Respondent). (*Withdrawn*).

1475-86-U: The Operative Plasterers' and Cement Masons' International Association of the United States and Canada Local Union 172 (Restoration Steeplejacks), (Complainant) v. Swing Stage Limited, Swing Stage Clima Inc., (Respondent). (*Withdrawn*).

1500-86-U: Laundry & Linen Drivers and Industrial Workers Union, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Conception Enterprises Inc., (Respondent). (*Withdrawn*).

1503-86-U: United Steelworkers of America, (Applicant) v. Canadian Timken, Limited, (Respondent). (*Withdrawn*).

1506-86-U: Labourers' International Union of North America, Local 183, (Complainant) v. Mattamy Homes Limited, (Respondent). (*Withdrawn*).

1510-86-U: Mrs. Julie Mountenay, (Complainant) v. Ms. Joan Gilchrist, President and Local 576 United Cement, Lime Gypsum and Allied Workers Division of the Boilermakers Union, (Respondent). (*Withdrawn*).

1514-86-U: International Association of Machinists and Aerospace Workers and its Local Lodge 235, (Complainant) v. Hobart Canada Inc., (Respondent). (*Withdrawn*).

1515-86-U: Labourers' International Union of North America, Local 607, (Complainant) v. Miller Paving Limited, (Respondent). (*Withdrawn*).

1520-86-U: Energy and Chemical Workers Union, (Complainant) v. K-Line Pharmaceuticals, (Respondent). (*Withdrawn*).

1521-86-U: Energy and Chemical Workers Union, (Complainant) v. K-Line Pharmaceuticals, (Respondent). (*Withdrawn*).

1547-86-U: The United Brotherhood of Carpenters and Joiners of America, General Workers' Union, Local 1030, (Complainant) v. Overhead Door Canada Division of Kenmar Door Limited, (Respondent). (*Withdrawn*).

1593-86-U: James Jensen, (Complainant) v. Local 59 E.C.W.U., Brian Little, (Chairman), (Respondent). (*Withdrawn*).

1598-86-U: Lee Bowen, (Complainant) v. G. W. Martin Veneer's Ltd., and International Woodworkers of America, (Respondent). (*Withdrawn*).

1644-86-U: Susan Smith, Tracy Wehlann, (Complainant) v. Square D Canada Electrical Equipment Inc., (Respondent). (*Withdrawn*).

1645-86-U: The International Association of Bridge, Structural and Ornamental Ironworkers, Local 759, (Applicant) v. Copper Cliff Mechanical Contractors Limited, (Respondent). (*Withdrawn*).

1652-86-U: Gregory O'Brien, (Complainant) v. Local 93 United Brotherhood of Carpenters and Joiners of America, (Respondent). (*Withdrawn*).

1699-86-U: Theogene Guignard, (Complainant) v. International Union United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Local 444 and Chrysler Canada, (Respondents). (*Withdrawn*).

JURISDICTIONAL DISPUTES

2427-85-JD: International Brotherhood of Boilermakers Ironship Builders, Blacksmiths, Forgers and Helpers, Local 128, (Complainant) v. Horton CBI Limited, and Millwright District Council of Ontario - United Brotherhood of Carpenters and Joiners of America, Local 1151, (Respondents). (*Withdrawn*).

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

3311-84-R: Canadian Union of Public Employees - CLC, Ontario Hydro Employees Union, Local 1000, (Applicant) v. Ontario Hydro (Peterborough Area Office), (Respondent). (*Dismissed*).

3294-84-M: CUPE - CLC, Ontario Hydro Employees Union, Local 1000, (Applicant) v. Ontario Hydro (Meter Reading Dingston Area Office), (Respondent). (*Granted*).

1490-86-M: The Association of Allied Health Professionals: Ontario, (Applicant) v. Ottawa Salvation Army Grace General Hospital, (Respondent). (*Withdrawn*).

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH & SAFETY ACT

1164-83-OH: Bob Osadca and Don Lowe, (Complainants) v. Barry Riddell and Allied Chemical of Canada Limited, Amherstburg, Ontario, (Respondents). (*Withdrawn*).

0233-86-OH: Douglas Leonard Phillips, (Complainant) v. United Co-Operatives of Ontario, (Respondent). (*Withdrawn*).

0529-86-OH: The United Brotherhood of Carpenters and Joiners of America, General Workers' Union, Local 1030, (Complainant) v. G. W. Martin Lumber Limited, (Respondent). (*Withdrawn*).

0568-86-OH: Health, Office & Professional Employees Division of Local 206, United Commercial Workers, chartered by the United Food & Commercial Workers International Union, (Complainant) v. Regional Municipality of Peel, (Respondent). (*Withdrawn*).

0740-86-OH: Garry Timmins, United Steelworkers of America, (Complainant) v. Inco Limited, (Respondent). (*Withdrawn*).

1376-86-OH: Kenneth Garayt, (Complainant) v. St. Mary's General Hospital, (Respondent). (*Withdrawn*).

COLLEGES COLLECTIVE BARGAINING ACT

3346-84-U: Ontario Public Service Employees Union, (Complainant) v. Cambrian College of Applied Arts and Technology, (Respondent). (*Dismissed*).

1494-86-U: The Ontario Public Service Employees Union, (Complainant) v. Georgian College of Applied Arts and Technology, (Respondent). (*Withdrawn*).

CONSTRUCTION INDUSTRY GRIEVANCES

2467-84-M; 2468-84-M; 2791-84-M: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Brant County Board of Education, (Respondent). (*Granted*).

0434-85-M: Sheet Metal Workers International Association Local 537, (Applicant) v. S. N. Ventilation Heating Limited c.o.b. as Steve's Sheet Metal Company, (Respondent). (*Granted*).

0894-85-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 508, (Applicant) v. Best Construction Ltd., (Respondent). (*Withdrawn*).

1381-85-M: Millwright District Council of Ontario/United Brotherhood of Carpenters and Joiners of America, Local 1151, (Applicant) v. Horton CBI, Limited, (Respondent). (*Withdrawn*).

1402-85-M: Labourers' International Union of North America, Local 1059, (Applicant) v. Ontario Hydro, Electrical Power Systems Construction Association, (Respondents). (*Dismissed*).

2742-85-M: United Brotherhood of Carpenters' & Joiners of America, Local Union 27, (Applicant) v. Devon Structural Ltd., (Respondent). (*Withdrawn*).

2952-85-M: Labourers' International Union of North America, Local 183, (Applicant) v. Fernview Construction Ltd., and Metropolitan Toronto Sewer & Watermain Contractors' Association, (Respondents). (*Withdrawn*).

3109-85-M: United Brotherhood of Carpenters and Joiners of America, Local 93, (Applicant) v. The Douglas MacDonald Development Corporation, Douglas MacDonald Development Corporation, Douglas MacDonald Homes Ltd., Douglas MacDonald Construction Limited and Macand Construction Ltd., (Respondents). (*Withdrawn*).

3110-85-M: United Brotherhood of Carpenters and Joiners of America, Local 93, (Applicant) v. The Douglas MacDonald Development Corporation, Douglas MacDonald Development Corporation, Douglas MacDonald Homes Ltd., Douglas MacDonald Construction Limited and Macand Construction Ltd., (Respondents). (*Withdrawn*).

3176-85-M: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and Local 7 Canada, (Applicant) v. Ottawa Carleton Bricklaying & Masonry Ltd., and/or Olivieri Masonry Ltd., (Respondent). (*Withdrawn*).

0382-86-M; 0383-86-M: United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. Linrin Forming Limited, (Respondent) v. Carpenters' Employer Bargaining Agency, (Intervener). (*Granted*).

0459-86-M: International Brotherhood of Electrical Workers, Local 105, (Applicant) v. Ontario Electrical Construction Company Limited, (Respondent). (*Withdrawn*).

0887-86-M: International Union of Operating Engineers, Local 793, (Applicant) v. Jan Peters Ltd., (Respondent). (*Withdrawn*).

1217-86-M: Operative Plasterers' and Cement Masons' International Association of United States and Canada, Local 598, (Applicant) v. Yorkview Concrete Finishing Ltd., (Respondent). (*Withdrawn*).

1301-86-M: United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Ron Aube and Associates, (Respondent). (*Granted*).

1314-86-M: Ontario Council of the International Brotherhood of Painters and Allied Trades, Local 1590, (Applicant) v. Cardinal Painting and Sandblasting, (Respondent). (*Withdrawn*).

1364-86-M: A Council of Trade Unions acting as the representative and agent of Teamsters' Local Union 230 and Labourers' International Union of North America, Local 183 and Teamsters' Local Union 230, (Applicant) v. Man-Co Construction Limited, (Respondent). (*Granted*).

1365-86-M; 1502-86-M: A Council of Trade Unions acting as the representative and agent of Teamsters' Local Union 230 and Labourers' International Union of North America, Local 183, (Applicants) v. Man-Co Construction Limited, (Respondent). (*Granted*).

1371-86-M: United Brotherhood of Carpenters and Joiners of America, Local 27, (Applicant) v. Union Carpentry Contractors Ltd., (Respondent). (*Granted*).

1422-86-M: Labourers' International Union of North America, (Applicant) v. Vaughan Paving Ltd., (Respondent). (*Dismissed*).

1446-86-U: Great Lakes Fishermen and Allied Workers' Union, (Complainant) v. Batista Fisheries Ltd., (Respondent). (*Withdrawn*).

1450-86-M: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Joe Arban Contractor Limited, (Respondent). (*Granted*).

1461-86-M: United Brotherhood of Carpenters' & Joiners of America, Local Union 27, (Applicant) v. Baker Installations Ltd., (Respondent). (*Granted*).

1462-86-M: United Brotherhood of Carpenters' & Joiners of America, Local Union 27, (Applicant) v. P. A. Richens Carpentry, (Respondent). (*Granted*).

1464-86-M: United Brotherhood of Carpenters' & Joiners of America, Local Union 27, (Applicant) v. Durham Wood Contracting, (Respondent). (*Withdrawn*).

1465-86-M: United Brotherhood of Carpenters' & Joiners of America, Local Union 27, (Applicant) v. Taylor Advertising Display, (Respondent). (*Withdrawn*).

1466-86-M: United Brotherhood of Carpenters & Joiners of America, Local Union 27, (Applicant) v. Specialty Woodworking Co. Limited, (Respondent). (*Withdrawn*).

1467-86-M: United Brotherhood of Carpenters' & Joiners of America, Local Union 27, (Applicant) v. Tri-Con Finishing Co., (Respondent). (*Withdrawn*).

1469-86-M: United Brotherhood of Carpenters and Joiners of America, Local 18, (Applicant) v. Acme Building and Construction Limited, (Respondent). (*Granted*).

1491-86-M: United Brotherhood of Carpenters and Joiners of America Local 18, (Applicant) v. North American Store Fixtures, (Respondent). (*Withdrawn*).

1492-86-M: United Brotherhood of Carpenters and Joiners of America, Local 18, (Applicant) v. Karl Noble Contracting, (Respondent). (*Granted*).

1493-86-M: United Brotherhood of Carpenters and Joiners of America, Local 18, (Applicant) v. Ontario Store Fixtures, (Respondent). (*Withdrawn*).

1509-86-M: Labourers' International Union of North America, Local 183, (Applicant) v. F.T. Const. Inc., (Respondent). (*Withdrawn*).

1522-86-M: International Union of Operating Engineers, Local 793, (Applicant) v. Jackson Construction Ltd., (Respondent). (*Withdrawn*).

1523-86-M: International Union of Operating Engineers, Local 793, (Applicant) v. Lafontaine's Excavating, (Respondent). (*Withdrawn*).

1528-86-M: International Brotherhood of Painters and Allied Trades, Local 1824, (Applicant) v. Apollo Painting & Decorating Ltd., (Respondent). (*Withdrawn*).

1536-86-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 463, (Applicant) v. Adam Clark Co. Ltd. - and - S. E. Rozell & Sons Inc., (Respondent). (*Withdrawn*).

1541-86-M: United Brotherhood of Carpenters and Joiners of America, Local 494 and Local 1256, (Applicant) v. Nelvis Pez Drywall, Division of Nelvis Pez Developments Ltd., (Respondent). (*Withdrawn*).

1542-86-M: Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Losereit Sales & Services (Respondent). (*Withdrawn*).

1543-86-M: Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Lombardi Style Drywall & Acoustics Limited, (Respondent). (*Withdrawn*).

1544-86-M: Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Flatley & Kay Ltd., (Respondent). (*Withdrawn*).

1552-86-M: International Brotherhood of Electrical Workers, Local 353, (Applicant) v. R.L.D. Electric, (Respondent). (*Granted*).

1553-86-M: Resilient Floorworkers, Local 2965, (Applicant) v. Aldershot Flooring Limited, (Respondent). (*Withdrawn*).

1559-86-M: United Brotherhood of Carpenters and Joiners of America, Local 93, (Applicant) v. Regal Forming Ltd., (Respondent). (*Granted*).

1569-86-M: Sheet Metal Workers International Association, Local Union 30, (Applicant) v. Tony Leite Roofing Limited, (Respondent). (*Withdrawn*).

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*Ontario Labour Relations Board,
400 University Avenue,
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M7A 1V4*

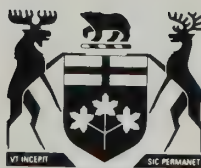
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**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

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BOUCHER'S AMHERSTVIEW SUPERMARKET; RE CINDY GALLAGHER; RE U.F.C.W. (LOCAL 175)

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Timeliness - Termination - Collective agreement having term of less than one year - Section 52(1) extending date of operation - Termination application not filed within last two months of term - Application dismissed as untimely

BOUCHER'S AMHERSTVIEW SUPERMARKET; RE CINDY GALLAGHER; RE U.F.C.W. (LOCAL 175)

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Trade Union Status - Certification - Union Successor Status - Whether merger of two international unions causing local to lose its status as a trade union - Applicant not entitled to presumption of status unless name identical with name used in previous proceeding - Use of name other than legal name not fatal to proof of status

HARTLEY GIBSON COMPANY LIMITED; RE TORONTO PRINTING PRESSMEN & ASSISTANTS' UNION LOCAL 10, SUBORDINATE TO G.C.I.U.

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Unfair Labour Practice - Damages - Remedies - Victim of unfair labour practice electing to take layoff rather than work as a helper for employer at 80 per cent of a mechanic's rate - Layoff continuing three months - Whether failure to mitigate losses

BECKETT ELEVATOR LIMITED; RE INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL 50.....

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Unfair Labour Practice - Duty of Fair Representation - Complainants discharged from maintenance staff of school board following criminal conviction - Union refusing to proceed to arbitration - Union failure to advise complainants of five day time limit for filing grievances not a breach of duty

MEDEIROS, TONY AND JOE DACOSTA, RE; RE C.U.P.E., LOCAL 1479

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Unfair Labour Practice - Duty of Fair Representation - Employer agreeing to accept seniority grievance of complainant but only on condition union would not grieve on behalf of any other employees moved down on seniority list as a result - Union refusing to pursue grievance on this condition - Whether union balanced interests of complainant and other members of bargaining unit

KONKLE, PATTY, RE; RE TRIDON EMPLOYEES' UNION

1533

Unfair Labour Practice - Practice and Procedure - Complainants objecting to construction work being done under maintenance agreement rather than provincial agreement - Complainants bringing complaint as members of union - Complainants having no legal interest in asserting violations of Act

FRASER, BARRY, ET AL., RE; RE I.B.E.W., I.B.E.W., LOCAL 105, K.G. ROSE, JADDCO ANDERSON LTD., THE HAMILTON ELECTRICAL CONTRACTORS ASSOCIATION, ET AL.

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Union Successor Status - Certification - Trade Union Status - Whether merger of two international unions causing local to lose its status as a trade union - Applicant not entitled to presumption of status unless name identical with name used in previous proceeding - Use of name other than legal name not fatal to proof of status	
HARTLEY GIBSON COMPANY LIMITED; RE TORONTO PRINTING PRESSMEN & ASSISTANTS' UNION LOCAL 10, SUBORDINATE TO G.C.I.U.	1517
Witness - Construction Industry Grievance - Practice and Procedure - Refusal by president of respondent to comply with Board direction to answer specific questions - Powers of Board to punish for contempt in face of the Board	
RINO ZANETTE (1981) LTD.; RE LABOURERS' UNION, LOCAL 607	1572

0204-84-M; 0205-84-M; 0393-84-U; 2602-84-M; 2603-84-U International Union of Elevator Constructors, Local 50, Applicant/ Complainant, v. **Beckett Elevator Limited**, Respondent

Damages - Remedies - Unfair Labour Practice - Victim of unfair labour practice electing to take layoff rather than work as a helper for employer at 80 per cent of a mechanic's rate - Layoff continuing three months - Whether failure to mitigate losses

BEFORE: *Ian C. Springate*, Alternate Chairman, and Board Members *I. M. Stamp* and *S. O'Flynn*.

APPEARANCES: *Barry Chercover* for the applicant/complainant; *Robert J. Atkinson* for the respondent.

DECISION OF THE BOARD; November 18, 1986

1. The Board issued a decision in these matters on June 25, 1986 in which it concluded that the respondent had violated sections 64, 66 and 80 of the *Labour Relations Act*. The respondent was directed to compensate Mr. T. McCann and Mr. M. Ferron for their losses resulting from the respondent's unlawful conduct. The parties subsequently reached agreement on the amount of compensation payable to Mr. Ferron. They were unable, however, to agree on the amount of compensation owing to Mr. McCann. Accordingly, that matter came on for hearing before the Board on October 24, 1986.

2. Prior to the events giving rise to these proceedings, Mr. McCann and Mr. Ferron had been employed as elevator mechanics by Ajax Elevator ("Ajax"). In December of 1983 the respondent purchased Ajax. The respondent decided that it would "hire" all of the elevator mechanics employed by Ajax, except for Mr. McCann and Mr. Ferron. The applicant trade union filed a grievance on behalf of Mr. McCann and Mr. Ferron, and referred the grievance to the Board pursuant to the provisions of section 124 of the Act. The grievance was based on the claim that the respondent was a successor employer to Ajax, and that Mr. Ferron and Mr. McCann continued as employees of the respondent who had been improperly laid off. The matter came on for hearing before a differently constituted panel of the Board on or about January 20, 1984. That panel issued an oral ruling holding that the respondent was in fact a successor employer to Ajax. The Board further directed that the respondent reinstate Mr. Ferron and Mr. McCann and pay them their back wages. The two employees were reinstated on or about January 23, 1984.

3. As detailed in the Board's previous decision, after their reinstatement Mr. McCann and Mr. Ferron were singled out for special treatment by Mr. A. Hopkirk, the respondent's Vice-President of Operations. On a number of occasions the two employees were assigned to work as helpers at 80 per cent of a mechanic's rate. It appears that in every instance where a mechanic had to be reassigned to work as a helper, either Mr. McCann or Mr. Ferron was selected, even over newly-hired mechanics. The collective agreement binding on the parties provides that an employer has a wide latitude in deciding which mechanics are to be assigned to work as helpers. Notwithstanding this fact, the Board was not satisfied with the bona fides of Mr. Hopkirk's explanation as to why Mr. Ferron and Mr. McCann were the ones constantly selected. After pointing out certain difficulties with Mr. Hopkins' evidence, the Board in its decision of June 25, 1986 made the following comments:

30. As indicated in the *Barrie Examiner* and *Pop Shoppe* cases, given the reversal of onus of proof in matters such as this, an employer is required to satisfy the Board as to what prompted

its actions that detrimentally impacted on an employee, and that the reasons were not tainted by an illegal motive. Given the facts of this case, we are not satisfied that Mr. Hopkirk's evidence as to why Mr. McCann and Mr. Ferron were the ones to continually be selected to be reassigned to work as helpers can be accepted at face value. Another possible explanation is that Mr. McCann and Mr. Ferron were singled out for special treatment because of the action of themselves and the applicant in successfully challenging the respondent's decision not to hire them in the first place. If this is what prompted the respondent's actions, the respondent would be in breach of sections 64, 66 and 80 of the Act. Particularly given that we are unable to accept Mr. Hopkirk's evidence as to why Mr. Ferron and Mr. McCann were continually selected as the ones to be assigned to work as helpers, we are led to conclude that Mr. Hopkirk, and through him the respondent, has not discharged the section 89(5) burden of proving that it did not act contrary to the Act as alleged.

4. As already indicated, the parties were able to agree on the amount of compensation payable to Mr. Ferron. Accordingly, we need concern ourselves only with the details of the earlier proceedings insofar as they relate to Mr. McCann. As already noted, Mr. McCann was reinstated by the respondent on or about January 23, 1984 in response to the Board's oral direction of January 20th. Mr. McCann was initially assigned to work with Mr. Ferron performing safety checks, even though another mechanic who started with the respondent at about the same time was assigned to his own maintenance route. On or about March 2, 1984, all of the former employees of Ajax were measured for uniforms by the respondent. The uniforms were delivered during the early part of April. No uniform was delivered for Mr. McCann. The only other employee who did not receive a uniform at the time was Mr. Ferron.

5. During March of 1984, Mr. McCann was assigned to work as a mechanic filling in for other mechanics who were away from work. On or about April 2, 1984 Mr. Rothenboker, a field supervisor with the respondent, advised Mr. McCann that he was being assigned to work as a helper at 80 per cent of the mechanic's rate. Mr. Rothenboker advised Mr. McCann that he personally was happy with Mr. McCann's work, and that he was just following instructions. The applicant grieved Mr. McCann's assignment and referred the grievance to the Board. The matter was scheduled to be heard by the Board on May 4, 1984. Two days prior to the hearing date, Mr. McCann was assigned to work as a mechanic. The hearing scheduled for May 4th did not occur, but rather was adjourned at the request of the parties. On May 7th, Mr. McCann was again assigned to work as a helper.

6. On May 7, 1984 Mr. McCann was advised that Mr. Hopkirk wanted to meet with him. According to Mr. Hopkirk's own evidence, he asked Mr. McCann what he was doing with a grievance, and stated that if Mr. McCann was going to play hard ball, the respondent was going to play hard ball too. Both Mr. McCann and Mr. Hopkirk testified that during the meeting Mr. Hopkirk indicated that he had no problems with Mr. McCann's work. The meeting ended with Mr. Hopkirk advising Mr. McCann that he would try to straighten things out, and with him shaking Mr. McCann's hand. On May 11, 1984, Mr. McCann was assigned to work as a mechanic.

7. On November 16, 1984 Mr. Wazney, one of the respondent's field supervisors, advised Mr. McCann that he was being assigned to do construction work. Construction work is different from, and at times a lot heavier than, the maintenance work Mr. McCann had been performing. Mr. McCann asked if he was to be working at 80 per cent. Mr. Wazney replied that he did not know, but would try to find out. Mr. Wazney advised Mr. McCann that the transfer was not his idea, and that he was only doing what he was told. Later that day, Mr. Caldwell, the respondent's construction manager, advised Mr. McCann that he would be working as a helper. Mr. McCann advised Mr. Caldwell that he would not accept 80 per cent, to which Mr. Caldwell replied that he had no work for Mr. McCann as a mechanic and accordingly he was being laid off. The relevant

collective agreement expressly provides that a mechanic who is assigned to work as a helper may instead take a layoff.

8. At the hearing on October 24, 1986, Mr. McCann gave evidence as to why he had elected to take a layoff rather than work as a helper at 80 per cent of a mechanic's rate. According to Mr. McCann, he had never previously encountered difficulties at work, and found that the respondent's treatment of him, which he viewed as harassment, was resulting in him becoming short tempered with his family. Mr. McCann testified that at the time he was aware that no maintenance mechanics belonging to the union were out of work. This led him to conclude that by going through the union hiring hall he would likely be able to get a job working as a mechanic. Mr. McCann added that he was not aware of any case where a maintenance mechanic had been unemployed for more than a week or ten days, and in the circumstances he felt he would be sent out to work within a couple of days.

9. Mr. Ernest Shaw was the applicant's acting business agent at the relevant time. Mr. Shaw testified that when Mr. McCann advised the union he was available for work, he was the only mechanic "on the bench". According to Mr. Shaw, in the elevator industry it is not unusual for there to be full employment for mechanics, some of whom may actually be assigned to work as helpers. Mr. Shaw further testified that at the relevant time, mechanics were usually on the bench for only a few days before a job opened up for them.

10. About one week into Mr. McCann's layoff, another elevator company asked the applicant to send it two mechanics. Before Mr. McCann could report for the job, however, the request was withdrawn. No further openings, for either a mechanic or a helper, occurred until February 1985, when Mr. McCann went to work as a mechanic. Mr. McCann was thus unemployed for about three months. It is clear from the evidence that such a long wait for a job was unusual and could not reasonably have been anticipated.

11. The respondent has compensated Mr. McCann for the time that he worked as a helper by paying him the additional 20 per cent he would have earned had he been working as a mechanic, plus interest. At issue is the period between November 1984, when Mr. McCann elected to take a layoff rather than again work as a helper, and February 1985 when he obtained employment as a mechanic with another company. The respondent has paid Mr. McCann an amount equivalent to 20 per cent of the mechanic's rate for this period. According to the respondent, Mr. McCann failed to mitigate his losses by working for it as a helper at 80 per cent, and accordingly, there is no need for the company to pay the full amount of his lost wages. As an alternative but related ground, the respondent contends that the damages flowing from its breach of the Act in assigning Mr. McCann to work as a helper were limited to 20 per cent of a mechanic's rate in that it was Mr. McCann's own decision to take a layoff which resulted in him losing the remaining 80 per cent. The respondent notes in this regard that Mr. Ferron always accepted assignments to work as a helper, including an assignment to work as a helper on construction work. For its part, the applicant contends that Mr. McCann is entitled to his full salary for the period between his layoff and new employment. In support of this position the applicant relies on the Common Law principle of constructive dismissal which allows an employee whose terms and conditions of employment have been substantially altered to treat his contract of employment as having been repudiated by the employer. The applicant also relies on a line of cases which indicate that an employee is generally not required to mitigate his losses by accepting other employment with the company that has constructively dismissed him. Although this point was not addressed by the parties, the cases indicate that this latter principle arises, at least in part, out of a concern that the acceptance of a different job from an employer might be viewed as a settlement with the employer, leaving the employee with

no cause of action. See: *Washer v. British Columbia Toll Highway & Bridges Authority* (1965), 53 DLR (2d) 620 (B.C.C.A.).

12. The Board has long required that victims of unfair labour practices take reasonable steps to mitigate their losses. Given the significant distinctions between a civil action for wrongful dismissal and a section 89 complaint in respect of an unfair labour practice, however, the Board has indicated that Common Law principles relating to mitigation will not always be applicable. Rather, the Board is concerned only that an employee act reasonably to mitigate his damages. What is reasonable depends on the circumstances of each particular case. See: *Sutton Place Hotel*, [1980] OLRB Rep. Aug. 1250; *Offset Make Up Ltd.*, [1969] OLRB Rep. Dec. 1152; *Bond Place Hotel*, [1983] OLRB Rep. Jan. 24. and *Wilco-Canada Inc.*, [1983] OLRB Rep. June 9. The respondent relies on the decision in *Wilco-Canada* as supporting its claim that Mr. McCann should have agreed to work as a helper. In that case the Board concluded that a number of unlawfully discharged employees should have mitigated their losses by accepting the employer's offer of reinstatement, which offer expressly reserved to the employees their right to continue proceedings before the Board. In line with the Board's reasoning in *Wilco-Canada*, we recognize that where an employee has been unlawfully reassigned to work at a lower pay, it may be reasonable for him to mitigate his losses by working at the lower rated job pending the outcome of proceedings before the Board. However, in certain circumstances, another course of action might also be reasonable. We believe this to be such a case.

13. The respondent unlawfully discriminated against Mr. McCann over an extended period of time. From the comments of Mr. Wazney, Mr. Rothenboker and Mr. Hopkirk, Mr. McCann was aware that the respondent's actions were not due to dissatisfaction with his work. He also knew that the respondent was prepared to play "hard ball" in its dealings with him. Presumably the respondent's goal was to get Mr. McCann to leave the respondent's employ or, if he stayed, to stop exercising his lawful rights to challenge the respondent's conduct. In these circumstances it is understandable that Mr. McCann turned his mind to ascertain whether some avenue other than accepting another reassignment was open to him. As it turned out, another reasonable avenue did appear available, namely to take a layoff from the company. This would bring to an end the strains associated with working for the respondent and allow Mr. McCann to obtain employment at 100 per cent of a mechanic's rate. It was reasonable at the time for Mr. McCann to believe that the wait for a new job would be brief, a matter of a few days. Given the pattern of the respondent's unlawful conduct and the reasonable likelihood of alternate employment with another firm in a short period of time, we are satisfied that Mr. McCann's action in severing his employment with the respondent was not unreasonable. Further, in that Mr. McCann's reasonable expectation was that he shortly would be receiving 100 per cent of a mechanic's salary, his actions also involved a reasonable attempt to mitigate his losses. As it happened, the period after Mr. McCann took his layoff was atypical in that the union received no manpower requests for a three-month period. In our view, however, this does not detract from the reasonableness of Mr. McCann's decision at the time he made it.

14. Having regard to the foregoing, we are satisfied that Mr. McCann is entitled to full compensation from November 14, 1984, when he was unlawfully reassigned to work as a helper, until the time he commenced employment with a new employer. The Board will remain seized of this matter in the event there is any dispute as to the actual amount of compensation involved.

1436-86-R Cindy Gallagher, Applicant, v. United Food and Commercial Workers International Union (Local 175), Respondent, v. **Boucher's Amherstview Supermarket**, Intervener

Termination - Timeliness - Collective agreement having term of less than one year - Section 52(1) extending date of operation - Termination application not filed within last two months of term - Application dismissed as untimely

BEFORE: *Ian C. Springate*, Alternate Chairman, and Board Members *D. A. MacDonald* and *J. J. Redshaw*.

APPEARANCES: *Cindy Lee Gallagher* on her own behalf; *David McKee* and *John Hurley* for the respondent; *Chris Eames* and *Maurice Boucher* for the intervener.

DECISION OF THE BOARD; November 5, 1986

1. This is an application under section 57 of the *Labour Relations Act* for a declaration terminating bargaining rights.

2. On April 8, 1986, the respondent trade union and the intervener employer entered into a collective agreement which was stated to expire on August 31, 1986. The instant application was filed on August 8, 1986 within the last two months of the stated expiry date. In that section 57(2)(a) of the Act provides that a termination application can be made within the last two months of a collective agreement, the application on its face appears to be timely. The trade union, however, contends it is untimely given the provisions of section 52(1) of the Act, which states as follows:

If a collective agreement does not provide for its term of operation or provides for its operation for an unspecified term or for a term of less than one year, it shall be deemed to provide for its operation for a term of one year from the date that it commenced to operate.

3. The collective agreement does not provide that its term of operation commenced prior to its signing date. Accordingly, we are led to conclude that the collective agreement commenced to operate on the day it was signed, namely April 8, 1986. See: *R & R Pre-Cast Erection Limited* [1968], OLRB Rep. May 172. The effect of section 52(1) of the Act is to extend the date of its operation to April 8, 1987. In these circumstances we are satisfied that the application was not, in fact, filed within the last two months of the operation of the collective agreement. It follows that the application is untimely and must be dismissed.

4. The application is hereby dismissed.

1799-85-R United Food & Commercial Workers International Union, Local 409, Applicant, v. Canada Safeway Limited and Current River Foods Ltd., Respondent, v. Group of Employees, Objectors

Sale of a Business - Employer acquiring right to use former Safeway premises complete with furnishings, fixtures and inventory - Board canvassing decisions respecting transactions in retail food trade alleged to be sale of a business

BEFORE: *N. B. Satterfield*, Vice-Chairman, and Board Members *W. H. Wightman* and *S. O'Flynn*.

APPEARANCES: *W. Dubinsky* and *Michael Fraser* for the applicant; *Fred Bickford* and *Jim Bacari* for the respondent; *Boyd Joseph Albertini* for the group of employees.

DECISION OF THE BOARD; November 7, 1986

1. This is an application made under section 63 of the *Labour Relations Act*. The applicant alleges that Current River Foods Ltd. is a successor to Canada Safeway Limited with respect to part of its business, being the business located at premises known municipally as 320 Arundel Street in Thunder Bay, Ontario. The store was known as the Hodder Avenue store under Canada Safeway Limited but will be referred to hereafter as the Current River store, or the store. For ease of reference, the Board also will refer hereafter to the applicant as "the union", Current River Foods Ltd. as "the employer" and Canada Safeway Limited, as "Safeway".

2. Section 63 of the Act reads, in part, as follows:

63.-(1) In this section,

- (a) "business" includes a part or parts thereof;
- (b) "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

...

(5) The Board may, upon the application of any person, trade union or council of trade unions concerned, made within sixty days after the successor employer referred to in subsection (2) becomes bound by the collective agreement, or within sixty days after the trade union or council of trade unions has given a notice under subsection (3), terminate the bargaining rights of the trade union or council of trade unions bound by the collective agreement or that has given notice, as the case may be, if, in the opinion of the Board, the person to whom the business was sold has changed its character so that it is substantially different from the business of the predecessor employer.

3. The union is seeking a declaration that there has been a sale of part of Safeway's business to the employer and that the employer, as a result, is bound by the terms and conditions of a collective agreement between the union and Safeway which was in effect at the time of the alleged

sale. The employer takes the position that it has merely taken over Safeway's lease with the Royal Trust Company for the Current River store, purchased some assets from Safeway, but has not taken over that part of Safeway's business which had operated in the Current River store. For that reason, according to the employer, there has been no sale pursuant to section 63 of the Act.

4. The employer sought to and did satisfy its evidentiary duty under subsection 13 of section 63 by calling to testify before the Board James Baccari and Yuri Stezenko. Baccari is a principal of Current River Foods Ltd. Stezenko is a relief district manager for Safeway and, when the Current River store was operated by Safeway, it came within his responsibilities. The union did not call any witnesses to testify on its behalf. The findings of facts herein are based on the Board's assessment of the testimony of the employer's witnesses as they were examined by counsel for the employer and the union and by the representative of the objectors, having regard to the usual criteria respecting credibility. Credibility is not a problem with either witness.

5. The Board's decisions respecting transactions in the retail food trade which are alleged to be a sale of a business within the meaning of section 63 of the Act fall into two main groups. The first group is represented by the Board's decision in *Dutch Boy Food Markets*, 65 CLLC 16,051 and the decisions following it until the decision of *More Groceteria Limited*, [1980] OLRB Rep. April 486. The second group is represented by the Board's decisions in *Valencia Foods*, [1984] OLRB Rep. May 773; *Gilham Foods*, [1984] OLRB Rep. Oct. 1423; *Queensway Food Ltd.*, [1984] OLRB Rep. Feb. 358; *Keele-Wilson Supermarket Limited*, [1985] OLRB Rep. March 425 (*Super Tops No. 1*) and *Super Tops Holdings Inc.*, [1986] OLRB Rep. Jan. 168 (*Super Tops No. 2*). The *Dutch Boy* line of cases attaches major importance to the elements of store locations and premises in finding that there has been a sale of a business under section 63 in transactions involving companies in the retail food business. In the second group of cases, the Board found that there had not been a sale within the meaning of section 63, rather the alleged successor had taken over the premises and idle assets of the prior occupant of the premises and used them to expand an existing, independent business into those premises.

6. The employer seeks to place its transaction with Safeway within the second group of decisions. To that end, it relies on what it characterizes as significant differences between the business which it carries on in the Current River store and the business carried on by Safeway when it operated the store in order to argue that the employer has used the premises and assets which it acquired so as to establish its own new business, distinct from the business of Safeway.

7. Baccari is a partner in the employer's business with his son-in-law, Jed Albertini. Prior to entering into that partnership, Albertini was in the real estate business and Baccari had been employed by Safeway for nearly 35 years. He had management responsibility during 27 of those years for various of Safeway's Thunder Bay stores, either as a store manager, district manager for Thunder Bay or relief district manager for its stores from Sault Ste. Marie west. Baccari was familiar with the Current River store. It was one of six operated by Safeway in the Thunder Bay area, two of which recently had been purchased from Dominion Stores Limited. The purchase had required the approval of the Foreign Investment Review Agency and one of the conditions of approval was that Safeway divest itself by September, 1985 of one of the stores which it had owned prior to the purchase. Baccari knew of that condition well before the deadline and that the store which would be disposed of was to be the Current River store. During a vacation visit to Thunder Bay in the late summer of 1984, he discussed with Albertini the possibility of taking over the premises and operating a retail food store there. They agreed that he should investigate that possibility with Safeway. His inquiry led quickly to an offer and acceptance of a sublease agreement for the premises.

8. Baccari and Albertini formed the corporation Current River Foods Ltd. on August 7th, 1985. In the person of the corporation they entered into a sublease agreement with Safeway to take over its lease with the Royal Trust Company until April 30, 2009. The agreement was made July 19, 1985 to have effect from September 8, 1985. Part of the agreement was that Safeway would sell and the employer would buy \$91,000.00 worth of fixtures and equipment in the store, and a parcel of land adjacent to the store for \$30,000.00. The employer also purchased all of the store inventory, except perishables. This purchase was made at Baccari's request because he did not want to delay reopening of the store and wanted to take advantage of customers' habits of coming to the store to do their food shop.

9. Safeway closed the store at the end of business on Saturday, September 7th, 1985. Prior to closing, there had been a sign displayed at the exit from the store giving notice of its pending closure. Safeway also advertised several times in the Thunder Bay papers the fact that the Current River store would be closing and sought the patronage of the store's customers for the three closest Safeway stores. These advertisements mentioned the fact that a new food store would be opening on the premises shortly in the name of Current River Foods. Baccari described the Current River area as being segregated from the City by the Current River and Boulevard Lake. The nearest Safeway store is ten minutes drive away, driving half the distance at 50 km/h and half at 80 km/h. He says there are quite a few elderly people in the area with no means of transportation who walk to the store to do their shopping. He acknowledged in cross-examination that local residents were upset with news of the store's closing.

10. The store was closed for one business week and was reopened on September 16th in the name of Current River Foods with all new employees. The employees of the former Safeway operation had been offered a chance to relocate at Safeway's other Thunder Bay stores. During the week when the store was closed, the employer cleaned and re-decorated the premises, made alterations to its layout and erected its own signs on the exterior of the store and property. The re-decorating involved putting a cedar facing across the front and top of the refrigerated products case, installing a fifteen foot flower and plant stand faced with cedar and eight orchard bins, also faced with cedar, for displaying fruits and vegetables. The grocery display area was reduced in size in order to make room for the new produce cases and also to make more room at the check-out counters. The effect of the physical changes was to open up the store so that more of it would be visible from its entrance and to provide more walking space. According to Baccari, the differences visible to the customers, compared with the way Safeway had the store set up, were the changes to the produce display fixtures, different locations for the food items and there would be nothing stacked in cases on the floor for sale. They would also see a new 'deli' counter in the meat section where a variety of luncheon meats would be available. The Safeway store did not have this feature.

11. The store continued to serve the same market area as Safeway had served. The employer sought to reach that market by distributing weekly flyers featuring the weekly specials which would be available at the store. These were distributed by mail to the rural parts of the area and by hand to the other parts. Safeway, on the other hand, had advertised in the daily newspapers and on local television. The employer did not use these media. From the opening of the store, the employer aimed at being different from Safeway when it operated the store by giving more personal service, including offering fresh meats cut to the customers' requirements instead of prepackaged meats, by offering deli meats and by trying to target the groceries and produce available in the store to suit customers' tastes. This was done by inquiring of the customers what were their preferences.

12. Baccari told the Board that the employer was particularly aiming at Ukrainian customers whom he believed made up the dominant ethnic group in the stores' market area. He was

unable to give any measure of the proportion of the market which they represented. When asked in chief what were the business implications of a “mostly Ukrainian population”, Baccari replied that it meant trying to identify what foods they were used to buying. He testified as to certain produce and meats which he perceived to be their preferences. There is little to distinguish these from what one would expect to find in any food store of comparable size. The items which he identified as being preferred by his Ukrainian customers were not featured in any of the flyers in evidence before the Board. Baccari also testified in cross-examination that he was not aware, when he acquired the rights to use this location, that Ukrainians were the dominant ethnic group. During the week when the store was closed, the employer took no special steps to serve any particular ethnic group in preparing the store for opening. Baccari learned from his customers after the store had opened that Ukrainians were the dominant ethnic group in the area. He also stated in cross-examination that, since the store had been in operation, in order to serve the special interests of its Ukrainian customers, Baccari asks them if they have any special requests. He admitted that he does this with all of the store’s customers.

13. The store’s major supplier of grocery items is Macdonald’s Consolidated, a subsidiary of Safeway. Approximately half of the grocery products available in the store are supplied from that source, whereas Safeway obtained 95 per cent of its grocery products from Macdonalds. The store continues to offer for sale some of Safeway’s private brands. On the other hand, the employer tries to offer specialty grocery products not available elsewhere in Thunder Bay and brand goods not available in chain supermarkets, by dealing with specialty suppliers which sell only to independent operators.

14. Employer counsel submits that these facts are very similar to the facts in the *Super Tops No. 1* decision, *supra*. Therefore, in the instant case, the Board should find that there has not been a sale of a business or of part of a business between Safeway and the employer for the same reasons that the Board reached that conclusion in the *Super Tops No. 1* decision. The Board decided in the latter case, that the alleged successor had acquired the physical premises and some assets from Safeway which it then used to expand its own, existing successful business. Therefore, section 63 had no application to the transaction. It is useful to quote the Board’s full reasons for reaching that conclusion:

19. The circumstances of this case are substantially similar to two recent “food store” cases where the Board had occasion to review in some detail the relevant legal principles (see *Queensway Foods Ltd.*, [1984] OLRB Rep. Feb. 358, and *Valencia Foods*, [1984] OLRB Rep. May 773). We see little purpose in repeating that analysis here. It suffices to say that we adopt, as our own, the reasoning in paragraphs 4 and 5 of *Queensway* and 23 to 28 in *Valencia*. We would only point out the ultimate conclusion enunciated in *Valencia*:

The lesson of the cases is that while location and premises are important elements of a retail food business, they are not themselves the business; even location and premises can be or become mere “surplus assets” which alone, or even in combination with other assets, can lack the dynamic or organic quality which distinguishes a business from an idle collection of assets....

That single sentence highlights the issue here: has the company acquired part of Safeway’s “business”, or has it merely acquired the right to use certain premises, formerly, used by Safeway?

20. We do not doubt the importance of location in the retail food industry - particularly since the habit of shopping locally can be an important element of good will and can be the key to business success even if good will is not expressly recognized in the transaction by which the location is acquired. There is no doubt that in this case, there are indications which, when considered in the context of the retail food industry, do tend to point towards a sale of a business within the meaning of section 63. The company continues to carry on a food business from the

same location as Safeway which has effectively withdrawn from that local market. The hiatus period between the closing of Safeway and the opening of Super Tops is relatively small (six weeks). The premises and general store layout are similar.

21. But there are also a number of factors which point in the other direction. Mr. Chetti had no intention of acquiring Safeway's business. Indeed, quite the contrary. He already operated two ethnically-oriented supermarkets in Metropolitan Toronto and was anxious to open a third. Safeway's business, as such, was unprofitable and not worth buying.

22. Mr. Chetti learned of the possibility of acquiring the Safeway premises from an independent real estate agent. The company did not acquire any managerial or other expertise from Safeway. The entrepreneurial initiative, managerial talent, and employee skills were all derived from Mr. Chetti's pre-existing operations or were assembled following the sale. A substantial sum was expended so that the new store would conform to Mr. Chetti's business concept rather than that of Safeway. Mr. Chetti knew that his success depended upon expanding, serving and developing his own market which was not being served by Safeway or the other local chain stores. He was able to do this with dramatic success because he was able to bring to bear his own business organization to attract customers whom Safeway never reached. That is why he was able to instantly triple the sales volume. He was not acquiring and reviving an ailing "part" of Safeway's business. He was expanding his own business from premises formerly occupied by Safeway.

23. We accept the union's submission that in the retail food business location is important, and the acquisition of physical premises will in many cases be sufficient to trigger a finding of "successorship"; moreover, when a "severed part" of a business has been transferred it would be an unusual purchaser who did not undertake any new initiatives, or try to put his own imprint upon his recent acquisition. On balance, however, we do not find a sale of a business in the facts of this case. In our view, the presence of Super Tops at Safeway's former location represents the expansion of an already well-established business in which some assets of Safeway came to be used. Those assets did not alone constitute a business or part of a business, and it cannot be said in this case that the company has expanded by purchasing a competitor's business and refurbishing it. It has merely purchased some idle and uneconomic assets which it has used to expand its own successful going concern. Section 63 has no application. This application is accordingly dismissed.

15. The facts supporting those reasons are set out in paragraphs 4 through 18 of the decision. Some of those facts reveal that the alleged successor already was operating a successful retail food business in two Super Tops stores. It set out to create a third store in the former Safeway premises at issue in that case. The store was closed for six weeks while extensive renovations were made at a cost of three quarters of a million dollars in order to bring about a significant change of emphasis in merchandising techniques. These included stocking the store with a large inventory of goods offering varieties which could not be found in the stores of the supermarket chains, and such things as fresh meats displayed in the European style. As the Board observed at paragraph 12, "[t]he focus, emphasis and selection were entirely different, particularly in the way that Super Tops sold meat, dairy products and produce". Super Tops' advertising was specifically targeted to the particular ethnic populations which they had identified as their market, and was done in the languages of those populations. The employees in the store were selected for their ability to serve customers in English as well as the languages of the ethnic populations which the store aimed to serve. Those facts and all of the facts set out in the decision make it clear that Super Tops directed its efforts from the start towards reaching an entirely different market than the one previously served by Safeway.

16. The Board in the instant case disagrees with employer counsel that the facts of this case are similar to those in *Super Tops No. 1*. They are so different as to readily distinguish it from the *Super Tops* decision. The employer did not have a plan to target a particular market not served by Safeway. It learned after it opened the Current River store that its market included a large number of Ukrainians and it tried to find out what special interests they had, just as it did for all customers.

That was part of the employer's attempts to personalize service in the store. While it was a deliberate effort to present a different service than Safeway had, it falls into the normal kind of initiatives one would expect of a new occupant trying to place its own stamp on the premises. While these are entirely understandable and sensible initiatives, they are not aimed at developing a new market, rather they are aimed at consolidating the existing market by hanging on to present customers and trying to attract others already in the market area. The employer was clearly responding to the location of the premises. It specifically sought to buy Safeway's inventory, excluding perishables, so that it could open the store as Current River Foods Ltd. with hardly skipping a beat. The employer had acquired from Safeway everything in the way of fixtures, equipment and inventory, except for perishables, to do so the moment it closed the transaction. The employer's efforts after opening the store were clearly directed towards consolidating the existing customers of the store and trying to recapture the ones which Safeway may have lost.

17. This case falls squarely within the *Dutch Boy* line of cases which emphasized the importance of location for a retail food store and of the support of the people who live within its area. Baccari recognized this importance when he said that he did not want to delay the opening of the store because he wanted to take advantage of the customer's habits of coming to the store.

18. The Board adopts the reasoning in the *Dutch Boy* line of cases and finds on the facts of the instant case, that the employer, in acquiring the right to use the former Safeway premises complete with its furnishings, fixtures and inventory became the "buyer" in the sale of part of Safeway's business within the meaning of section 63 of the Act. Therefore, Current River Foods Ltd. is the successor employer to Canada Safeway Limited respecting the Current River store and is bound to the collective agreement between Canada Safeway Limited and United Food & Commercial Workers International Union, Local 409 which was in effect at the time of the sale.

1271-86-R; 1267-86-R; 1269-86-R; 1272-86-R; 1274-86-R; 1276-86-R; 1278-86-R; 1279-86-R; 1280-86-R; 1281-86-R; 1282-86-R; 1283-86-R; 1284-86-R; 1286-86-R; 1287-86-R; 1288-86-R; 1290-86-R; 1291-86-R; 1292-86-R; 1293-86-R Great Lakes Fishermen and Allied Workers' Union, Applicant, v. C.P. Fisheries Ltd. et al.

Constitutional Law - Practice and Procedure - Stay requested while courts decide constitutional question of jurisdiction - Union also requesting notice be given to Attorneys General of Board proceedings - Board having duty to rule upon constitutional challenge to assist courts in event of a judicial review - Notice to Attorneys General not required in this division of powers challenge

BEFORE: *Patricia Hughes*, Vice-Chairman, and Board Members *J. Sarra* and *W. G. Donnelly*.

DECISION OF THE BOARD; November 4, 1986

1. In each of these matters, the applicant union ("the union") has brought an application for certification in which it requested a pre-hearing representation vote. By decisions dated September 4, 1986, the Board directed that a pre-hearing representation vote be held in each of these applications and the votes were accordingly held. The Board then scheduled hearings before us for the purpose of hearing objections raised by the respondents to the pre-hearing representation votes and with respect to matters arising out of the conduct of the votes.

2. The purpose of the initial hearing before us was to establish the procedure to be followed in all these files. At the outset of the hearing, counsel for the respondents in File Nos. 1276-86-R and 1283-86-R, Brian Nolan, requested that the Board grant a stay in these proceedings. Counsel had previously sought a declaration in the Supreme Court of Ontario that this Board was acting outside its jurisdiction in hearing these matters, on the basis that labour relations in fisheries are regulated by the federal government and not by provincial legislation. In a decision dated September 20, 1986, Sirois, J., of the Supreme Court of Ontario, held that that application was premature and that "this court should not interfere with the expertise of the Board to establish its own jurisdiction even on the constitutional question of jurisdiction". The decision of the Supreme Court has been appealed to the Court of Appeal and counsel requested that this Board stay proceedings until the outcome of that application. The issue of jurisdiction has been raised before this Board and in that regard, counsel for the union requested that notice be given to the Attorney General of Ontario and perhaps of Canada of these proceedings before the Board. In oral decisions, we declined to stay these proceedings and declined to require that notice be given to the Attorneys General or to give notice ourselves.

3. With respect to his request for a stay, Mr. Nolan admitted that the Board's jurisprudence indicates a general reluctance to grant stays where the Board has reached a decision and one of the parties seeks judicial review. However, he argued that that was not the situation before this Board where there has been no decision of the Board, but rather, the respondents seek a stay with respect to the fundamental question of whether the Board should enter into these inquiries. He argued that the governing decision should be *Regina v. Ontario Labour Relations Board, Ex parte Ontario Food Terminal Board* (1963), 38 D.L.R. (2d) 530 (Ont. C.A.). In that case, which dealt with the question of whether the Ontario Food Terminal Board was a crown agency and therefore not subject to the Ontario *Labour Relations Act*, the Ontario Labour Relations Board determined that the Food Terminal Board is not a crown agency and went on to determine the application for certification made by the union. Mr. Justice Laidlaw, for the Court of Appeal, stated that the Labour Relations Board "had no right or power to determine that question, because it is a pure question of law which can be determined only by judges". He went on to say that the Board and other tribunals

must necessarily decide in the first instance and in every case whether or not it will assume jurisdiction to entertain an application brought before it, but the jurisdiction of all such tribunals is subject to challenge in a Court of competent jurisdiction by any entrusted party. In my opinion, when the question of jurisdiction or any other question of pure law is raised in a proceeding before a tribunal so constituted, the proceeding should stayed until such question has been finally determined by a Court of competent jurisdiction.

Mr. Justice Laidlaw went on in what he himself indicated is *obiter* to say that "the Legislature could not give the Ontario Labour Relations Board jurisdiction to determine any question of law within the competence and jurisdiction only of a validly constituted Court". Mr. Nolan argued that that decision has not been overturned and that it is still good law. He argued that since jurisdiction goes to the very question of the enabling legislation itself, and is a question of pure law dealing with the *Constitution Act, 1867*, the Board cannot resolve this question but must await the decision of the Courts. He argued that to proceed in a matter which is already before the Courts would cost considerable expense and time which may prove to be unnecessary and that there is no prejudice to the applicant since the votes have been taken and the results are in the Board files.

4. The Ontario Court of Appeal also dealt with the appropriate procedure to follow when the Board's jurisdiction was questioned in *Re Cedarvale Tree Services Ltd. and Labourers' International Union of North America, Local 183*, [1971] 3 O.R. 832. In that case, Mr. Justice Arnott, for the Court, stated as follows:

The judgement of Laidlaw, J. A., in the *Ontario Food Terminal Board* case, *supra*, cannot be relied upon as authoritative in relation either to jurisdiction of the Board to decide questions of law, or to procedures to be followed when its jurisdiction is questioned.

In reaching this conclusion, Mr. Justice Arnott examined the judgement of McRuer, C.J.H.C. in *R. v. Ontario Labour Relations Board, Ex p. Taylor*, [1964] 1 O.R. 173 and the cases referred to therein. He pointed out that no distinction is made between a challenge to the Board's jurisdiction on the basis of, for example, an exclusion within the *Labour Relations Act* itself and a constitutional challenge, such as that before this Board. Mr. Justice Arnott then went on to state:

"It is clear to me that under the *Labour Relations Act* the Board is master of its own house not only as to all questions of fact and law falling within the ambit of the jurisdiction conferred upon it by the Act, but with respect to all questions and procedure when acting within that jurisdiction. In my view, the only rule which should be stated by the Court (if it be a rule at all) is that the Board should, when its jurisdiction is questioned, adopt such procedure as appears to it to be just and convenient in the particular circumstances of the case before it."

His Lordship then went on to note that a party is not required to wait until the tribunal has reached a decision on the matter it before going to Court. But he also indicated that "[i]t is also clear law that such a tribunal is not required to bring its proceedings to a halt merely because it has been served with a notice of motion of *certiorari* or prohibition. It is entitled, if it thinks fit, to carry its pending proceedings forward until such time as an order of the Court has actually been made prohibiting its further activity or quashing some order already made by which it assumed jurisdiction".

5. The Board has consistently held that it will not stay proceedings while matters are before a court or in the face of a pending application. In *Windsor Airline Limousine Services Limited*, [1980] OLRB Rep. Feb. 272, the Board was required to determine whether a taxi business which did two per cent of its business in the United States was an interprovincial undertaking and therefore within federal jurisdiction or a local business and therefore within provincial jurisdiction. The Board concluded that the business was a local undertaking and went ahead with the case. After the Board gave its ruling on that issue, the respondent requested an adjournment on the basis that it was going to challenge the Board's jurisdiction in court. The Board concluded "that the possibility of an indefinite postponement of the employees' rights during the course of judicial review did not justify suspending the Board's proceedings. It therefore declined a request for an adjournment". That case was then appealed and the Board's power to continue proceedings in the face of a court challenge to its jurisdiction was upheld in *Re Windsor Airline Limousine Services Ltd. and Ontario Taxi Association 1688 et al.* (1980), 30 O.R. (2d) 732 (Div. Ct.). Reid, J., for the Court, indicated that it was appropriate for the Board to reach a decision on the constitutional matter. He stated the following:

[The Board's decision] includes a very lengthy and careful review of the constitutional issue. The Board did that deliberately. I am conscious that an attitude prevailed in the not too distant past when that might have been deplored by the Court on the ground that the tribunal was dealing with an issue it was not competent to decide. I do not share that view. I agree with the Board's position. The Board's extensive consideration of the constitutional issue in this case was helpful to me at least, and I believe to my colleagues on this Court, when the matter came here for resolution. I think it is helpful in general to have a tribunal address itself to an issue of this type. Among other things, it conduces to the elicitation of the facts relevant to the issue. We might be wholly without them if the tribunal simply threw up its hands and left the issue to the Courts.

6. In *Four B Manufacturing Ltd.*, [1978] OLRB Rep. Sept. 829, the Board determined that it had the jurisdiction to deal with an application for certification brought by the applicant. The manufacturing operation was located on an Indian reserve and it was therefore claimed by the respondents that it was within federal jurisdiction. The Ontario Divisional Court upheld the

Board's determination and that decision was upheld by the Ontario Court of Appeal. The case was then appealed to the Supreme Court of Canada (which did decide that it was a matter of federal jurisdiction). The respondent sought a stay of an order of the Board with respect to the respondent's failure to comply with a previous order arising out of an allegation under section 89 of the Act. In addition, the union filed a bargaining in bad faith charge and the respondent asked that a stay to those proceedings be implemented. The Board refused the stay in both instances. We agree with that approach. In addition, in the instant case there has been a decision of the Supreme Court of Ontario supporting the Board's jurisdiction to proceed in this matter until otherwise determined.

7. Thus in our view, we have the jurisdiction to proceed. But should we do so? As always, there are competing interests. The respondents argue that if we proceed and either the Board or a court finds that the Board does not have jurisdiction, costs and time will have been unnecessarily expended. The applicant argues that much time will be lost before its rights can be determined if the Board stays proceedings. In determining the convenience with respect to exercising its discretion to order a stay, the Board must take into account these various competing interests. We have done so and decline to order a stay to these proceedings.

8. We endorse the comments of the Board in the *Windsor Airline* case, *supra*:

7. When faced with a challenge to its constitutional jurisdiction, the Board has a clear duty to consider and rule upon the challenge, and in so doing to recite and analyze the facts as thoroughly as possible. Clear findings of fact, with some comment on the ramifications of the facts for industrial relations policy, will assist the courts in the event of a judicial review of the Board's determination. As the Board put it in *Dry Bulk Forwarders Ltd.*, [1974] OLRB Rep. Sept. 629 at 632:

"The Courts are the great equalizers in the application of constitutional law of principles, but neither they nor the parties should be denied the viewpoints of the inferior tribunals -- viewpoints based upon the *viva voce* evidence that comes before them. Only in this way can the Courts meaningfully assess the facts upon which the constitutional law of principles must be applied."

It is with those principles in mind that the Board turns to consider the facts and the law applicable in the case before it.

9. With respect to counsel for the union's request that we add the Attorney General as party and give him notice of these proceedings, counsel referred to Rule 79 of the Board Rules of Procedure. He argued that the Attorney General of Ontario has an interest in these proceedings because Ontario's jurisdiction is involved, and interest is exhibited by the Attorney General's active involvement in the respondent's application to the Supreme Court. He admitted that the Attorney General would not have an interest in the certification application itself, but is interested both as a result of being brought into the earlier case and as a result of the challenge to our jurisdiction. The respondent's position was argued by Mr. Godard, counsel in File Nos. 1272-86-R, 1280-86-R and 1291-86-R. He argued that whether the Attorney General should be brought into the case as a party under Rule 79 or given notice of these proceedings are two different questions. We agree with this distinction. We are not at all persuaded that section 79 applies. However, the question of whether the Attorney General should be given notice is a more difficult one.

10. It is our view that whether we require that notice be given (or indeed give notice ourselves) is a matter of the Board's discretion: see *Cedarvale Tree Services Ltd. and Labourers' International Union of North America, Local 183*, *supra*. In our view, section 122 of the *Courts of Justice Act*, which requires notice to the Attorney General of Ontario and Canada where "the constitutional validity or constitutional applicability" of legislation is involved (or the legislation

cannot be “adjudged” invalid or inapplicable) does not apply to this Board. However, this does not end the matter, since principles of fairness do apply. In this case, the applicability of the Ontario *Labour Relations Act* to these certification applications has been challenged on constitutional grounds. The Board has required notice to the Attorney General when issues under the *Canadian Charter of Rights and Freedoms* have been raised before the Board. For example, in *Dominion Paving Limited*, [1986] OLRB Rep. July 946, the Board refused to entertain the constitutional challenge under the *Charter* where notice had not been given because the Attorney General should be given an opportunity to defend legislation under section 1 of the *Charter*. The Board also ruled in *F.D.V. Construction Ltd.*, [1986] OLRB Rep. May 617 that it was without jurisdiction to deal with the constitutional challenge to section 1(4) of the *Labour Relations Act* because proper notice had not been given to the Attorneys General. In that case, the Board proceeded with the merits of the application in case it was wrong on its ruling. Both these cases involve challenges under the *Charter of Rights*. We do not propose that there are no situations in which notice to the Attorneys General might be appropriate in a division of powers challenge; it is our view that circumstances of the current case do not require notice to be given.

11. In *Charter* cases, a possible effect of a successful challenge would be that the impugned provision of the *Labour Relations Act* or even an entire statute (as in the case of *Dominion Paving*) would be struck down. The person most able to defend such legislation and explain why it is reasonable and justifiable, under section 1 of the *Charter*, is the Attorney General. That is not the case with respect to a division of powers issue. Although there are facts at issue in division of power cases, they are more a matter of background facts which the parties are able to adduce. However, a more important (although related) distinction between *Charter* and division of powers cases is this: in *Charter* cases, the Board is making a determination about the validity of legislation or of provisions of legislation; in division of power cases, the Board is determining whether or not it can proceed, or, in other words, determining the threshold question of its jurisdiction. There is no danger that we will strike down legislation or any particular provision in a statute. The Board has the power to determine its own jurisdiction, subject to the Courts’ overturning such determination. We note, too, that the Attorneys General were given notice of the court proceedings and are aware of the application before this Board and that neither Attorney General has expressed an interest in appearing before us in any capacity. Accordingly, we conclude that it is not necessary to give notice to the Attorney General in this instance.

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[Remainder of decision omitted: Editor]

2105-86-R London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., Applicant, v. **Des Security Systems Corporation**, Respondent.

Bargaining Unit - Certification - Employees terminated subsequent to application date but prior to terminal date - Same employees then provided to employer by personnel agency - Preliminary objection that no employees left in bargaining unit dismissed

BEFORE: *Robert Herman*, Vice-Chairman, and Board Members *G. O. Shamanski* and *B. L. Armstrong*.

APPEARANCES: *Mark Zigler* and *Kirsten Bratley* for the applicant; *Nancy A. Eber* and *Peter Di Murro* for the respondent.

DECISION OF THE BOARD; November 26, 1986

1. This is an application for certification.
2. At the opening of the hearing, counsel for the respondent raised by way of a preliminary motion, an objection to the Board considering this certification application, as in her submissions there were no longer any employees of the respondent. The Board notes that the application date for this proceeding was October 21, 1986 and the terminal date was November 3, 1986. Counsel asserted that in June of 1986 a decision was made by the respondent employer to look around and find a personnel agency from which it could obtain employees. The respondent felt at that time that it would be more efficient and less costly to use employees provided by a personnel agency rather than itself being an employer of such individuals. On October 10, 1986, the respondent signed a contract with Best Personnel Services, in which it was agreed that the current employees of the respondent were to be terminated and subsequently hired by Best Personnel Services, and in turn such employees of Best were to be provided to the respondent. That contract did not set out a date by which this was to be accomplished.
3. On October 20, 1986, counsel submitted that the employees of the respondent were advised of this arrangement, and pursuant thereto all employees of the respondent were terminated on October 31, 1986. They thereupon filled out applications to work for Best Personnel Services and all the individuals who had been employees of the respondent were hired by and became employees of Best. In counsel's submission, it would therefore be inappropriate to award bargaining rights with respect to the respondent, as there were no longer any employees in the bargaining unit.
4. After hearing submissions from the applicant, the Board orally ruled that the individuals in question were employees of the respondent at the relevant time and therefore the Board would be proceeding to consider the certification application. The Board referred the parties to a prior decision of the Board, differently constituted, in *Simpson's Limited* [1984] OLRB Rep. Oct. 1520. In that decision the Board stated as follows, at paragraph 3:

3. The majority of the Board, after hearing the submissions from all parties, delivered the following oral ruling. Board Member W.H. Wightman reserved his decision on the preliminary issue raised by the respondent.

RULING

The Board has before it three applications for certification filed by the Retail, Whole-

sale and Department Store Union in respect of three different groups of employees of the respondent, Simpsons Limited. Although the applications have been and are being treated separately, counsel for the respondent has raised an argument based on the application in Board File 1630-84-R that applies to all three proceedings. The Board, therefore, heard argument on the issue and its ruling will apply to all three proceedings.

The respondent gave notice of termination of employment, to be effective on November 3, 1984 to several hundred employees on July 11, 1984 in accordance with a national policy implemented by it. That policy resulted in approximately 280 employees in the group for which the union seeks bargaining rights in Board File 1630-84-R, the downtown store, receiving the notice of termination. Counsel advised the Board that the employees who received this notice of termination would also receive severance pay, provided the employees continued to work until November 3, 1984, unless the company waived that requirement. The Board was also advised that a small number in that group of 280 would be transferred to vacant positions and if the transfer took place, they would not receive severance pay.

Counsel for the company argues that the employees who received notice of termination and who will terminate on November 3, 1984 are no longer employees for purposes of the application for certification, and therefore cannot be considered in determining the level of membership enjoyed by the union. Additionally, counsel submits that even if these persons are technically employees, the Board should deem them not to be employees since those employees, as of receiving notice of termination, no longer have a continuing interest in their employment relationship with the respondent. Counsel further argues that the same policy considerations which prompt the Board to defer processing a certification application and direct the taking of a representation vote in build-up situations (see *F. Lepper & Son Ltd.*, [1977] OLRB Rep. Dec. 246) should also guide the Board here in determining whether the persons receiving the notice should have any bearing on applicant's rights to obtain certification.

The union's response to the respondent's argument is brief. It argues that the persons in question were employees as of the date of application and therefore must be included for purposes of the count to determine the union's level of membership.

We agree with the union's submission. Section 7(1) of the Act requires the Board to determine the number of employees in the unit as of the date of application. The Board applies various criteria to make that determination. See *Amplifone Canada Ltd.*, [1967] OLRB Rep. Dec. 840 where the Board stated at paragraph 14:

"Although the unit time is determined by the provisions of section 7(1), nothing is said in that section or elsewhere in the act [sic] concerning the method or criteria to be used by the Board in ascertaining the number of employees in the bargaining unit at the material time. The determination as to whether a person is or is not to be numbered as an employee on the date of application is, therefore, left entirely to the discretion of the Board. To ensure consistency and order in its proceedings and with a view to the purely practical difficulties involved, the Board has adopted certain practices and rules of thumb applicable to the various situations which commonly arise in the employer-employee relationship.

The issue of whether a person is an employee for the purposes of the count generally arises when that person is not at work on the date of the application. Thus, the Board adopts the 30-day rule or seven week rule, for example to assist in making this determination. We agree with counsel's submission that these rules are flexible, but in our opinion, flexibility in applying these rules cannot cause the Board to ignore the facts before it. The people in question were at work in the employ of the respondent on the day the application was filed.

A similar, though not identical problem has arisen before the Board where an employee's eligibility to vote was questioned because the employee had given notice

of intention to quit before the vote, to be effective the day after the vote. The Board, in that case, held that as she was employed on the date of the vote, she was eligible to vote (see *London District Crippled Children Treatment Center*, [1980] OLRB Rep. April 461). In our view, the principles outlined therein apply here to these facts. The persons in question were at work in the employ of respondent on the application date. The Board cannot change that fact. See paragraph 11 of the *Amplifone* case, *supra*. Therefore, the Board dismisses the respondent's argument. For these same reasons, the Board is not inclined, even if we could, to deem that those persons are not employees.

Counsel for the respondent argued that his submissions would also be relevant to the Board's exercise of discretion to order a vote under section 7(2) of the Act. The Board advised the parties that it would not deal with that related but separate issue until a determination was made with respect to the level of support enjoyed by the union. We wish to make it clear that the question of the Board's exercise of its discretion to order a vote remains open and although the submissions may be similar, the issue of the exercise of the Board's discretion is clearly different from the issue upon which we have ruled."

5. We agree with and adopt the analysis set out above in the quote from *Simpsons Limited*. Accepting all the facts as asserted by counsel for the respondent as true, it is clear that the individuals in question were employees of the respondent as of the application date. The fact that they were purportedly terminated subsequent to the application date, but prior to the terminal date, does not effect our conclusion that they were properly employees as of the date of application, the date which the Board considers pursuant to sections 7(1) of the *Labour Relations Act*, and accordingly and for these reasons the Board ruled against the preliminary motion.

6. Subsequent to this ruling the parties met with a Board Officer prior to any further hearings, reached agreement on all matters in dispute between them and agreed to waive their right to any further formal hearing in the matter.

7. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

8. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent at Sarnia, Ontario save and except supervisors, and persons above the rank of supervisor, constitute a unit of employees of the respondent appropriate for collective bargaining.

9. The Board is satisfied on the basis of all the evidence before it that more than fifty-five percent of the employees of the respondent in the bargaining unit at the time the application was made, where members of the applicant on November 3, 1986, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

10. A certificate will issue to the applicant.

1427-86-U James Clarke, Norman Davidson, Al Forsyth, **Barry Fraser**, Terry Fraser, Gerry Maloney, Complainant, v. International Brotherhood of Electrical Workers, International Brotherhood of Electrical Workers, Local 105, K.G. Rose, P. Dillon, T. Beattie, Jaddco Anderson Ltd. and The Hamilton Electrical Contractors Association, Respondents

Practice and Procedure - Unfair Labour Practice - Complainants objecting to construction work being done under maintenance agreement rather than provincial agreement - Complainants bringing complaint as members of union - Complainants having no legal interest in asserting violations of Act

BEFORE: *Harry Freedman*, Vice-Chairman and Board Members *D.A. MacDonald* and *H. Kobryn*.

APPEARANCES: *J. Barry Fraser* and *Royce S. Arnold* for the complainants; *A.M. Minsky, Q.C.* for the International Brotherhood of Electrical Workers and *Kenneth G. Rose*; *A.M. Minsky, Q.C.* and *S. Wahl* for the International Brotherhood of Electrical Workers, Local 105, *P. Dillon* and *T. Beattie*; *D.L. Brisbin* and *B. Timmins* for Jaddco Anderson Ltd.; *S.C. Bernardo* and *J. Cameron Nolan* for the Electrical Contractors Association of Hamilton.

DECISION OF THE BOARD; November 21, 1986

1. The Board delivered the following oral ruling at its hearing in this matter on November 13, 1986;

The respondents have moved to have this complaint (as amended) dismissed by reason of undue delay in the filing of the complaint, and also on the ground that the complaint does not make out a *prima facie* violation of the *Labour Relations Act*. The respondents also submit, in connection with that second ground, that the complainants do not have a sufficient legal interest, that is, they lack the status to bring the complaint.

The complainants' representative, in a forceful argument, sought to explain the basis for the time taken to file the complaint and refute the submissions made by the respondents. In our consideration of these issues, we have not addressed ourselves to the issue of delay, but only to whether the complainants have standing to make this complaint and whether a *prima facie* violation of the Act is made out.

This complaint arises from the respondent Local 105 and the respondent Electrical Contractors Association Hamilton entering into a "maintenance agreement". The complaint as amended alleges that the respondent Jaddco Anderson Ltd. performed work at a Dofasco blast furnace under the maintenance agreement. The complainants claim that such work is construction work coming within the industrial, commercial and institutional sector of the construction industry and therefore should have been performed pursuant to the IBEW provincial agreement.

The complainants concede that there is nothing illegal or improper about the respondents entering into a maintenance agreement. Their complaint is that

the respondents are performing industrial, commercial and institutional sector construction work under the maintenance agreement.

The complainants were officers of the respondent Local 105. They bring this complaint as members of that local union.

Assuming that the complainants could prove all of the allegations remaining in the original complaint, after the complainants' withdrawal of several allegations relating to internal union affairs, we find that those remaining allegations do not disclose any violation of the Act.

The amendment to the complaint that we permitted at the opening of the hearing yesterday morning states:

"2. Summary of Material and Facts Relied Upon

(a) There is an I.C.I. Principal [sic] Agreement made and entered into between The Electrical Trade Bargaining Agency Of The electrical Contractors Association Of Ontario and all other Signatories to this Agreement (hereinafter called the Contractor) and The International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario in place to which E.C.A.O. and I.B.E.W. are signatories with a term of two years. This is a renewal agreement. The new Provincial Agreement will expire on April 30, 1988.

(b) Electrical work has been and is being done at the Number 4 Blast Furnace Reline at the premises of Dofasco in Hamilton ("the blast furnace work"). That work is being performed by Jaddco Anderson Company Limited ("Jaddco").

(c) Jaddco is a member of the Electrical Construction Association of Hamilton who signs the Provincial I.C.I. agreement on behalf of its member contractors.

(d) The Complainants state that the blast furnace work above is construction work within the meaning of Section 1(1)(f) of the Act. Work equivalent to the blast furnace work has historically been performed under the I.C.I. agreement.

(e) The Respondents I.B.E.W. Local 105 and E.C.A.H. have entered into a so-called maintenance agreement dated August 19, 1985 and renewed on or about August 27, 1986.

(f) The Respondents have taken the position that the blast furnace work is covered by the maintenance agreement and not the I.C.I. agreement.

(g) Jaddco, to the knowledge of the Respondent union, has required that employees on the blast furnace work job site sign a written acknowledgement that they will be working under the maintenance agreement before they are hired.

(h) Members of the respondent union who have worked or are working under the maintenance agreement on the blast furnace work receive wages and benefits inferior to those otherwise payable under the I.C.I. agreement.

3. Statutory Violations

(a) The Complainants state that the conduct of the Respondent union violates Sections 50, 68, 135(2a), 146(1) and 146(2) of the Act.

(b) The Complainants state that the conduct of the Respondent Association violates Sections 50, 135(2a), 146(1) and 146(2) of the Act.

(c) The Complainants state that the conduct of the Respondent Jaddco violates Sections 50, 66, 135(2a), 146(1) and 146(2) of the Act.”

During the complainants’ argument, the representative of the complainant submitted that employees had been refused employment when they would not sign the acknowledgment described in paragraph 2(g) above and that many of their fellow members were intimidated into not filing grievances over the application of the maintenance agreement. No particulars of those allegations were set out in either the original complaint or in the amendments to that complaint however, and as the complainants’ representative stated, there was no allegation that any of the complainants were refused employment because they would not agree to work at the Dofasco job under the maintenance agreement.

Therefore, it seems to us that the complainants, as members of the respondent Local 105 have not had any of *their* rights under the *Labour Relations Act* violated by the respondents. Had the complainants made allegations about such refusals, or had the complaint been made by persons who had been denied employment, our conclusion on this issue might well have been different.

We are also satisfied that as there is no allegation that the complainants have either not been employed, or been refused employment under the maintenance agreement or the industrial, commercial and institutional sector provincial agreement, they have no legal interest in asserting a violation of section 50 of the *Labour Relations Act*.

Furthermore, since at the times material to this complaint, the complainants were not employees in a bargaining unit, there can be no violation of section 68 of the *Labour Relations Act* in regard to them. (see *Keith MacLeod Sutherland*, [1983] OLRB Rep. July 1219; *Arthur Joseph Roberts*, [1974] OLRB Rep. March 169; and *Bricklayers, Masons Independent Union of Canada, Local 1*, [1979] OLRB Rep. April 278.)

It is not alleged that any of the complainants have been refused employment, or discriminated in employment by the respondent Jaddco Anderson Limited. Therefore, no violation of section 66 of the Act is made out.

Section 135(2a) is a procedural section. One cannot violate section 135(2a). Therefore, the complainants cannot rely on that section of the Act to found a violation.

As for section 146, we are satisfied that before a person can claim a violation of section 146, that person must have a direct interest that is affected by the agreement or arrangement that is alleged to be unlawful. In our opinion, the complainants’ interests are simply too remote at this point. They have not worked under the agreement or arrangement, nor have they sought to work or been refused work under the agreement or arrangement. There is nothing before us alleging that that agreement or arrangement has had any direct impact on the complainants. Therefore, we find that the complaint does not establish a *prima facie* case.

We note at this point that the complaints against the respondents International Brotherhood of Electrical Workers, K. G. Rose, Patrick Dillon and Thomas Beattie were dismissed on consent at the opening of yesterday's hearing.

For the reasons set out above, this complaint is hereby dismissed against the remaining respondents.

While we have found that the complaint must be dismissed, it seems to us that if construction work in the industrial, commercial and institutional sector is being performed under something other than the provincial agreement, that matter is very serious and ought to be raised in an appropriate manner, either by the complainants through Local 105 or before this Board by a person or union affected by the improper arrangement.

2217-86-R Labourers' International Union of North America, Local 183, Applicant, v. Globfin Developments Limited, Respondent

Certification - Construction Industry - Practice and Procedure - Reply requesting a hearing to defend on grounds of Charter of Rights and Freedoms - Respondent failing to comply with s.97 of Rules by failing to substantiate request for a hearing - Certification granted without a hearing

BEFORE: *N. B. Satterfield*, Vice-Chairman, and Board Members *I. M. Stamp* and *J. Redshaw*.

DECISION OF THE BOARD; November 25, 1986

1. The name of the respondent is amended to read: "Globfin Developments Limited".
2. In this application for certification the applicant filed four combination applications for membership and receipts. The combination applications for membership are signed by the employees and the receipts are countersigned and indicate that a payment of \$1.00 has been made within the six-month period immediately preceding the terminal date of the application. The money was collected by one person. The applicant also filed a duly completed Form 80, Declaration Concerning Membership Documents, Construction Industry.
3. The respondent filed a reply, a list of employees containing seven names on Schedule "A" and specimen signatures within the time fixed in accordance with the *Labour Relations Act* and the Board's Rules of Procedure.
4. In paragraph 14(2) of the reply, the respondent consents that the Board dispose of the application without a hearing and states as follows:

Globfin Developments Limited is *NOT* bound by any collective agreements nor does it wish to become bound by any collective agreements. Should the Board decide not to dispose of Labourers' International Union of North America, Local 183, Notice of Applications of Certification,

Globfin Developments requests to be advised and requests a hearing of the Board in order to defend its' position under the Canadian Charter of Rights & Freedoms and the Constitution.

[emphasis in original]

5. If the Board has the correct understanding of that statement, the respondent is consenting to the application being processed without a hearing only if the Board is going to dismiss the application, otherwise, the respondent is requesting a hearing "...in order to defend its' position under the Canadian Charter of Rights & Freedoms and the Constitution". Section 102(14) of the Act provides that the Board need not hold a hearing into an application for certification made under the construction industry provisions of the Act for the purposes of determining the merits of the application for certification. In the Board's view, the statement made by the respondent has the same effect as though the respondent had completed the reply to request the Board to hold a hearing into the application in order for the respondent "...to defend its' position under the Canadian Charter of Rights & Freedoms and the Constitution". Therefore, the Board will treat the reply as though making a request for a hearing on the grounds set out.

6. Section 97 of the Rules of Procedure under the *Labour Relations Act* is a section which pertains to applications for certification made under the construction industry provisions of the Act. It states as follows:

97. Where a party requests a hearing of the application by the Board, he shall set out in the application, reply or intervention, as the case may be, a concise statement of,

- (a) the material facts upon which he proposes to rely at the hearing;
- (b) the relief to which he claims to be entitled by reason of such facts; and
- (c) the submissions he proposes to make in support of his claim for relief.

7. The reply contains no statement as to the "position" which the respondent is seeking to defend under "...the Canadian Charter of Rights & Freedoms and the Constitution." and makes no reference to any section of the Charter or the Constitution under which the respondent is asserting a claim that its rights or freedoms are being contravened by this application or by the Board determining the application on its merits without holding a hearing into the application. The respondent simply has made a rhetorical reference to the Charter and the Constitution and, with nothing more, that does not substantiate the request for a hearing. In short, the respondent has failed to comply at all with section 97 of the Rules of Procedure and fails to disclose any material fact which might be reason for the Board to hold a hearing into the application. Accordingly, the Board will exercise its discretion under section 102(14) of the Act to determine the merits of the application without a hearing.

8. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on September 30, 1983, the designated employee bargaining agency is The Labourers' International Union of North America and The Labourers' International Union of North America, Ontario Provincial District Council.

9. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial

and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

10. The Board further finds, pursuant to section 144(1) of the Act, that all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the County of Simcoe and the District Municipality of Muskoka, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

11. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on November 13, 1986, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

12. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 8 above in respect of all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

13. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all construction labourers in the employ of the respondent in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

0674-86-R Toronto Printing Pressmen & Assistants' Union Local 10, Subordinate to G.C.I.U., Applicant, v. **Hartley Gibson Company Limited**, Respondent

Certification - Trade Union Status - Union Successor Status - Whether merger of two international unions causing local to lose its status as a trade union - Applicant not entitled to presumption of status unless name identical with name used in previous proceeding - Use of name other than legal name not fatal to proof of status

BEFORE: *G. T. Surdykowski*, Vice-Chairman, and Board Members *J. A. Rundle* and *J. Sarra*.

APPEARANCES: *Stephen Krashinsky* and *Bill Hall* for the applicant; *David N. Corbett* and *Ruby Thomas* for the respondent.

DECISION OF THE BOARD; November 6, 1986

1. This is an application for certification in which the applicant requested the taking of a pre-hearing representation vote. In accordance with its usual practice, the Board appointed a Labour Relations Officer to meet with the parties to try to settle the voting constituency and the voters' list. The parties were in substantial agreement with respect to the description of the bargaining unit and the voting constituency. The sole outstanding issue between them in that respect is whether or not the position of "foreman" should be included in the bargaining unit. The applicant's position is that the incumbent "foreman" exercises managerial functions within the meaning of section 1(3)(b) of the *Labour Relations Act*. The respondent takes the contrary position.

2. By decision dated June 25, 1986, a differently constituted panel of the Board ("the Gray panel") directed that a pre-hearing representation vote be taken the proviso that if Bill Lyons, the individual whose status is in dispute, voted, his ballot would be segregated. The voting constituency was described in accordance with the bargaining unit claimed to be appropriate by the respondent as follows:

all employees of the respondent in the Municipality of Metropolitan Toronto, save and except production manager, persons above the rank of production manager, office and sales staff, and persons regularly employed for not more than twenty-four hours per week.

3. In addition, the Gray panel found as follows:

5. It appears from the check of the Board's files that the Board has not in any previous proceeding found the applicant to be a trade union within the meaning of clause 1(1)(p) of the *Labour Relations Act* under the name "Toronto Printing Pressmen & Assistants' Union Local 10. Subordinate to G.C.I.U." It will therefore be necessary for the applicant to establish, at a hearing conducted after the vote, that it is a "trade union". We note that the organization named in the membership applications filed herein is "Toronto Printing Pressmen & Assistants' Union Local 10 Subordinate to Graphic Communications International Union", a name different from the one in which the applicant has applied for certification. The ballot box will be sealed and the ballots not counted pending resolution of these issues.

4. The representation vote was held on the employer's premises on July 4, 1986. No statement of objections and desire to make representations was filed with the Board within the time fixed under section 70(1) of the Board's Rules of Procedure following the taking of a vote. In addition, the parties agreed in writing to an immediate counting of the ballots, other than the segregated ballot. The results of the voting are such that regardless of the eligibility of the disputed indi-

vidual to vote and the way in which he might have cast his ballot, more than fifty percent of the respondent's employees have voted in favour of trade union representation. Accordingly, the Board scheduled the matter for hearing for the purpose of dealing with the issues set out by the Gray panel *supra*.

5. At the hearing of the matter on October 3, 1986, counsel for the applicant referred the Board to an earlier proceeding before the Board in *Orchid Label and Printing Co. Ltd.*, (Jan. 2/86, Board File No. 2168-86-R) in which the Board found that the applicant, identified in the title of the proceeding as Toronto Printing Pressmen & Assistants Union Local No. 10, was a trade union within the meaning of section 1(1)(p) of the Act. Counsel also relied on the application for certification in that proceeding on which union is equivalent to finding that the Toronto Printing Pressmen & Assistants' Union Local 10 Subordinate to: G.C.I.U. is a trade union and that it is, pursuant to the provisions of section 105 of the Act, *prima facie* evidence in this proceeding of the status of the applicant as a trade union.

6. The majority of the Board (Board Member Sarra dissenting) disagreed. On its face, the Board's decision in *Orchid Label and Printing Co. Ltd.*, *supra*, arose out of an agreement between the parties which resolved all of the matters in dispute between them and dispensed with a formal hearing into the matter. Further we are not entitled to go behind the finding of trade union status in the Board's decision. In the title of the Board's decision, the applicant is identified as being "Toronto Printing Pressmen & Assistants' Local No. 10" and it is only *that* entity, and no other, that was found by the Board to be a trade union within the meaning of section 1(1)(p) of the Act. Section 105 of the *Labour Relations Act* sets up a rebuttable evidentiary presumption of trade union status for organizations that the Board has previously found to be a trade union. Because of the nature of that provision, an applicant in certification proceedings is not entitled to the benefit thereof unless its name is identical to that which the Board has previously found to be a trade union. Even a relatively minor difference in name may reflect that an applicant with a name "similar to" or even "substantially the same as" that of an organization previously found to be a trade union is either an entirely different entity or that it has undergone some change which may result in it being a trade union no longer. It was therefore the view of the majority that the applicant in this proceeding is not entitled to the benefit of section 105 of the Act and that it was necessary for it to establish its status as a trade union independently.

7. The sole witness who testified before the Board was A. William Hall, president of the applicant. There is no material dispute on the facts.

8. In 1882, an organization called the Toronto Printing Pressmen's Union Local 10 broke away from what was identified as the "Typographical Union." In 1895, the organization's membership base was broadened and it became known as the Toronto Printing Pressmen & Assistants' Local Union 10. A document identified as the Constitution and By-laws of that organization, adopted in October, 1957, shows its name to be "Toronto Printing Pressmen and Assistants' Union No. 10 subordinate to The International Printing Pressmen and Assistants' Union of North America", the latter being identified as the founding body. That same document was identified by Mr. Hall as being the Constitution of the applicant. In 1973 (according to Exhibit 4 and not 1968 or 1969 as recollected by Mr. Hall), as a result of a merger between the International Printing Pressmen and Assistants' Union of North America and The International Stereotypers and Electrotypers Union, this same organization came to be known as the "Toronto Printing Pressmen & Assistants' Union Local No. 10, subordinate to: International Printing and Graphic Communications Union". On at least two separate occasions, in *David Printing Limited*, (Board File No. 1572-76-R) and *Kohl & Madden Printing Inc. Company of Canada Limited* (Board File No. 1160-79-R), this latter name was found by the Board to be that of a trade union within the meaning of the

Labour Relations Act and had certificates issued to it. The words "subordinate to" identified the Toronto Printing Pressmen and Assistants' Union Local No. 10 as being affiliated with and a local of the International Printing and Graphic Communications Union which, as its name suggests, was an international trade union.

9. Subsequently, as a result of discussions between the International Printing and Graphic Communications Union and the Graphic Arts International Union, those two organizations caused there to be drafted an agreement for merger between them and a proposed constitution for the merged organization. The name proposed for the new organization was the Graphic Communications International Union. Both international unions held referendum ballots pursuant to their constitutions, and the members of both voted in favour of the merger. Accordingly, effective July 1, 1983, the Graphic Communications International Union came into existence and the two merging bodies ceased to exist. The merger agreement included the following provisions:

The International Printing and Graphic Communications Union and the Graphic Arts International Union, both affiliated with the AFL-CIO and the CLC, agree to create and establish a single labor organization through the process of merger. Both unions themselves are the product of prior mergers. By this merger, they bring that much closer the ultimate and strongly desired goal of one International Union for the entire graphic communications industry, with greater job security and economic prosperity for the thousands of men and women who contribute their labor to produce the diverse quality products of the industry.

They agree upon the following objectives, purposes, principles and procedures to accomplish merger, the following policies to make the merger more effective, and the following basis upon which the merged organization shall function.

...

Labor unions exist primarily for purposes of organizing the unorganized and achieving decent wages and working conditions through collective bargaining. Merger will strengthen the collective bargaining process by eliminating the wasteful competition among unions and will provide obvious advantages for the members and the employers. Merger, combining our resources for the purpose of effectively organizing the industry, presents tremendous opportunities to advance the welfare of the combined membership in dealing with the identical problems the merging unions face. In short, this merger will radically alter for the better, our ability to represent our membership in the graphic communications industry.

...

Second, all IP & GCU Conferences and GAIU Regional Conferences and Chartered Locals will continue to exist according to their Constitutions and Bylaws. All Locals, Councils, and Conferences of the merging Internationals will automatically become Locals, Councils, and Conferences of the Graphic Communications International Union.

...

The Constitution provides that all Local Unions of each International Union shall automatically become Local Unions of the GCIU upon the effective date of merger and hold charters issued by the GCIU.

It is necessary to have a uniform system of designating Local Unions. The Constitution provides that each Local Union shall be designated as Graphic Communications Union Local (number) followed by a letter or symbol denoting craft or division. A special letter or symbol will indicate that a Local Union is totally merged, representing members from all major divisions.

It is clear that a local of either of the merging organizations, of which Toronto Printing Pressmen and Assistants' Union Local No. 10 subordinate to International Printing and Graphic Communi-

cations union was one, continued as a local of the new Graphic Communications International Union.

10. The proposed constitution was adopted by the new international union and governs that organization to this day. Among other things, it stipulates that:

Section 3. The objectives of the International Union shall be:

...

b. to advance and extend the economic and other welfare interests of its members, including their job security and job opportunities by the establishment and implementation of laws and policies designed to accomplish such results and by continued improvement in the terms of collective bargaining agreements.

11. Pursuant to Chapter 3.3 of the International Constitution, a Charter dated July 1st, 1983 was issued by the International Union which recognized the Toronto Printing Pressmen and Assistants' Local Union Local No. 10, subordinate to International Printing and Graphic Communications Union as Local 10-C of the Graphic Communications International Union. Chapter 3.3 states:

Ch.3.3. Charters shall be issued by the GCIU designating each Local Union as Graphic Communications Union Local (number) followed by a letter or symbol denoting craft or division. Any variation from this form must be approved by the General Board.

(a) On the effective date of this Constitution, all Locals Councils and Conferences of the IP & GCU and the GAIU shall be Locals, Councils and Conferences of the Graphic Communications International Union as fully as if originally chartered by the International, and all International Members of each of the merging Unions shall be International Members of the Graphic Communications International Union. The Constitution, Bylaws and governing practices of the Locals, Councils and Conferences shall continue in full force and effect, except that any provisions thereof, in conflict with this Constitution and the Laws of the International, shall be inoperative and of no further force and effect after a reasonable period as is an unavoidable incident of merger....

12. Since 1895, the applicant has been known as the Toronto Printing Pressmen & Assistants' Union Local No. 10. From time to time other notations were added to denote affiliation with an international union. Evidently, the merger which created the Graphic Communications International Union did not change that situation so that subsequent to that merger the applicant operated as the "Toronto Printing Pressmen & Assistants' Union Local No. 10 subordinate to the Graphic Communications International Union". Nor did the merger have any other impact of substance. The applicant continued to operate with a high degree of autonomy; the local constitution and bylaws were unchanged; its officers and business agents remained the same; its offices did not change locations; there was no change in its bank account; and there was no change in the collective bargaining activity or administration. Toronto Printing Pressmen & Assistants' Union Local No. 10 subordinate to Graphic Communications International Union has subsisting collective bargaining relationships with a number of employers in the Toronto area. On the collective agreements with those employers, the acronym "G.C.I.U." appears in place of "Graphic Communications International Union" in the applicant's name. There is a pride and tradition associated with the name Toronto Printing Pressmen & Assistants' Union Local No. 10 which, according to Mr. Hall, is the reason why the applicant continues with that name instead of adopting the name in the Charter issued to it. Evidently, even correspondence from the International Union is addressed to the "Toronto Printing Pressmen & Assistants' Union Local No. 10 subordinate to Graphic Communications International Union".

13. It is not disputed that the Toronto Printing Pressmen & Assistants' Union Local No. 10 and the Toronto Printing Pressmen's & Assistants' Union Local No. 10 subordinate to International Printing and Graphic Communications Union were one and the same organization which was a trade union within the meaning of the Act. However, counsel for the respondent submits that the merger that created the Graphic Communications International Union caused it to cease to exist effective July 1st, 1983; that is, the merger had the effect of creating a new organization which, though it may itself be a trade union, is not the applicant. In addition, the respondent argued that there is a reasonable expectation of confusion in the minds of the employees as to which union they were joining such that the Board should disregard both the documentary evidence filed and the result of the representation vote. On both, or either, of these grounds, submits the respondent, this application should be dismissed. In the alternative, the respondent submits that the name of the applicant should be amended to reflect its actual (that is, its legal) name and that another representation vote should be held. The respondent does not rely upon the applicant's use of the acronym "GCIU" in the application in the place of Graphic Communications International Union as a basis upon which the Board should reject the application.

14. The applicant maintains that the merger changed nothing of substance and that the applicant is the same trade union now as it was prior to July 1st, 1983. Counsel correctly notes that there is no evidence of any actual confusion on the part of the employees, that no employee has come forward to complain, and that the applicant was the only union soliciting the support of the employees at any material time.

15. Because the certification of trade unions in this province is based primarily upon an assessment of a trade union's support as evidenced by membership records filed in support of an application, the Board places heavy reliance on the membership evidence filed by the union. In this case, we also have evidence in the form of the results of a representation vote. Nevertheless, whether or not a union is entitled to even a vote is dependent upon the Board being satisfied that it has a requisite level of support which is evidenced by the documentary evidence of membership filed by the union. As a result, and because the documentary membership evidence is a form of hearsay which is not disclosed to the employer and which is not subject to cross-examination, the Board requires that the nature and quality of that evidence meet a high standard. Any arguable irregularities or deficiencies in that documentary evidence will at the very least serve to complicate the processing of an application for certification and contribute to cost and delay. Often such problems are minor and easily avoided by an applicant trade union that exercises reasonable care.

16. In its application for certification, the applicant chose to use the acronym "G.C.I.U." in its name rather than setting out "Graphic Communications International Union" in full. Naturally, it was the name that appears on the application that was used in all documents generated by the application, including the Form 7 Notice to Employees of Application and Request for Pre-Hearing Vote and the Form 69 Notice of Taking of Vote. Because the full name, not the acronym, were used on the combination membership applications and receipts filed with the Board in support of the application, the documentary evidence does not refer precisely to the applicant as described in the application or Board documents. While the Board ought not be unduly technical in such matters, such a lack of precision should be discouraged. However, no allegation of actual confusion or objection with respect to this discrepancy has been made by any party with an interest in the proceedings and the evidence before us demonstrates that the variations in nomenclature creates no real basis for expecting that there was any confusion amongst the employees as to what they were joining or voting for. Moreover, we are satisfied that "Toronto Printing Pressmen & Assistants' Union Local No. 10, subordinate to G.C.I.U." and "Toronto Printing Pressmen & Assistants' Union Local No. 10 subordinate to Graphic Communications International Union" are, and were understood to be, the same organization.

17. The more difficult issue is the question of the status of the applicant as a trade union. Section 1(1)(p) of the *Labour Relations Act* provides as follows:

1.-(1) In this Act,

• • •

(p) "trade union" means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.

18. Apart from section 1(1)(p), the legislation is silent with respect to the form or structure of trade unions. The Board has no authority to look beyond the statutory definition or to regulate the internal workings or constitutional arrangements of an organization of employees that otherwise meets the statutory definition (*CSAO National (Inc.) v. Oakville Trafalgar Memorial Hospital Association et al.* (1972) 26 D.L.R. (3d) 63 (Ont. C.A.); *Emery Industries Limited*, [1980] OLRB Rep. March 316). In this case, the issue is whether the present applicant is the same organization as that which was found by the Board to be a trade union prior to July 1st, 1983 or whether the merger of international unions that was effective that date had the effect of causing the present applicant to lose its status as a trade union. In order to make this determination, the Board must look to what changes, including any constitutional or name changes, there have been in the form and structure of the organization, and the circumstances under which these occurred. A review and assessment of these facts enables the Board to decide whether there has been a fundamental change in the organizations sufficient to affect its status as a trade union, or that the changes, if any, are minor alterations in form and structure which have no such impact. (*Food Corp. Limited*, [1983] OLRB Rep. May 636; *Consumers Distributing Company Limited*, [1981] OLRB Rep. May 509; *Coca Cola Ltd.*, [1975] OLRB Rep. Nov. 862; *The Spectator*, [1974] OLRB Rep. April 235).

19. In *Food Corp Limited*, *supra*, which was also an application for certification, the respondent employer made a similar argument, based on somewhat different but analogous facts, to that being put forward by the respondent in this proceeding. In that case, the applicant for certification was undergoing certain structural and name changes coincidentally with its campaign to organize the employees of the respondent. More specifically, Local 75 of the Hotel, Restaurant and Cafeteria Employees Union affiliated with the Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO-CLC. As a result, the names of both were changed; to Hotel Employees and Restaurant Employees Union Local 75 and Hotel Employees and Restaurant Employees International Union respectively. In addition, a number of smaller locals of the parent International Union were merged with or 'folded into' Local 75. The Board had the following comments:

10. The above-noted transactions changed the name, size, and responsibilities of Toronto Local 75, but there was no substantive or structural change. All of the officers of the Local remain the same. The business agents remain the same. The address remains the same. The bank account remains the same. Collective bargaining activity and the administration of existing collective agreements has gone on just as before. Local 75 has a number of subsisting collective bargaining relationships with employers in the Toronto area, and in respect of those relationships, Local 75 has continued to perform its role and fulfill its responsibilities as the employees' bargaining agent. No employer has raised any question about this, and it is acknowledged by the respondent that even if Local 75 under its "old name" and Local 75 under its "new name" were to be treated as two entirely separate entities (rather than the same entity with a slightly different name), both would clearly be "trade unions" within the meaning of section 1(1)(p) of the *Labour Relations Act*. It is also agreed that there is no other trade union operating in Ontario or in Toronto which could be confused with Local 75 under either its old or new name. No other

union has sought to organize the respondent's employees. The only union on the scene is Local 75.

11. The problem in this case arises from the various ways in which the applicant refers to itself on the various documents associated with this proceeding. The application itself, made on January 18, 1983, was filed mistakenly under the name "Hotel, Restaurant & Cafeteria Employees Union, Local 75" - the "old name" for the Toronto Local and the name in which the earlier application had been filed several months before. The old application was referred to as a precedent when the union filed the present application, and, in consequence, the old name was mechanically but mistakenly inserted in the style of cause. The membership documents filed in support of the application are of two different kinds. One group of cards is headed "APPLICATION FOR MEMBERSHIP in the HOTEL AND RESTAURANT EMPLOYEES' AND BARTENDERS' INTERNATIONAL UNION affiliated with AFL - CIO CANADIAN LABOUR CONGRESS"; and indicates a place where the employee makes application to become a member of HOTEL AND RESTAURANT EMPLOYEES' AND BARTENDERS' INTERNATIONAL UNION Local No. 75. These cards, more or less conform to the old name for the parent and local union, except that the latter has more recently included a reference to Cafeteria Employees. By signing such card, the employee is joining Local 75 of a hotel and restaurant employees' union affiliated to an international parent union. The other group of cards has a preamble APPLICATION FOR MEMBERSHIP in the HOTEL EMPLOYEES', RESTAURANT EMPLOYEES', INTERNATIONAL UNION and there follows a space wherein the individual employee makes application to become a member of HOTEL, RESTAURANT AND CAFETERIA EMPLOYEES' UNION LOCAL 75. In the case of these cards, the preamble reflects the new name of the International, but the traditional name of Local 75. Again, however, it is obvious that the employee is joining Local 75 of the hotel and restaurant employees' union which has an affiliation with its American parent union. The literature supporting the organizing campaign also refers to the union which employees are invited to join as the "Hotel, Restaurant and Cafeteria Employees' Union - Local 75 of Hotel and Restaurant Employees' and Bartenders' International Union". And there is reference to "Hotel Employees' and Restaurant Employees' International Union AFL-CIO" too. Finally, in accordance with the way in which the applicant initially styled this proceeding, employees were asked to vote upon whether or not they wish to be represented by the Hotel, Restaurant & Cafeteria Employees Union, Local 75.

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15. The Board acknowledges that the union's organization campaign in this case coincided with certain structural and nominal changes to Hotel, Restaurant & Cafeteria Employees Union, Local 75; however, even so, it is evident that the union has been rather lax and sloppy in the conduct of its campaign through the use of membership cards and literature which do not refer precisely to the local union's correct name. Such laxity should not be encouraged. On the other hand, the evidence before us demonstrates beyond doubt that, despite certain variations in nomenclature, there has been no substantive change in the legal identity of Local 75, which was and continues to be a trade union within the meaning of section 1(1)(p) of the Act; nor is there any real basis for confusion as to what the employees were joining or voting for. In our view, it would be unduly technical (as well as inequitable) if we were to disregard the desires of the employees for trade union representation as expressed on both the membership cards and the secret ballot vote. This is not a case, for example, where individuals could have been confused about whether they were joining one local or another, or a local versus a parent body. In such circumstances, different considerations might well apply. Here, however, there has only been one union on the scene from the outset and we do not think there is any reasonable basis for concluding that the employees did not know what they were voting for. We note, once again, that no employee has made any such assertion.

20. In our view, the observations and reasoning in *Food Corp. Limited* are equally apposite here. It is clear that a local union of the International Printing and Graphic Communications Union, which the applicant was prior to July 1st, 1983, continued as a local union of the new Graphic Communications International Union. The difficulty in this case is that, as evidenced by the Charter issued to it, the legal name of the applicant changed as a result of the merger that gave birth to the new International Union, but it continued to use the same name after as before the

merger with the exception that the words "Subordinate to Graphic Communications International Union" replace the words "Subordinate to: International Printing and Graphic Communications Union" after "Toronto Printing Pressmen & Assistants' Union Local No. 10." This was the only external reflection of the internal changes undergone by the applicant pursuant to the merger and new constitution of the new International Union. We are satisfied, on the evidence before us, that there has been a constitutional continuity which is indicative of a continuation of identity of the applicant. Although there are practical reasons, including the speed with which matters are processed by the Board, why a trade union might not want to be known by any name other than its legal name, there is no reason in law why it cannot carry on business under a name other than that legal name, so long as it does not do so for any improper purpose. We are satisfied that the applicant did not lose the essential characteristics of a trade union that it possessed prior to July 1st, 1983 as a result of the merger that was effective that date.

21. In any event, the evidence before the Board leaves us satisfied beyond any doubt that the applicant is an organization of employees that has purposes which include the regulation of relations between employees and employers.

22. The Board therefore finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

23. In view of the matter remaining in dispute, the Board hereby appoints a Labour Relations Officer to inquire into and report to the Board on the status, duties and responsibilities of the person classified by the respondent as foreman; namely Bill Lyons.

24. On the basis of the evidence before the Board and in view of the fact that the ultimate determination of the matter remaining in dispute with respect to the description of the bargaining unit cannot materially affect the Board's determination in this regard, we are satisfied that more than thirty-five percent of the employees in the bargaining unit, at the time the application was made, were members of the union within the meaning of section 1(1)(l) of the Act. It is also evident, having regard to the results of the representation vote, that whether or not the "foreman" is included in the unit, more than fifty percent of the ballots cast were cast in favour of trade union representation by the applicant. Accordingly, the Board, pursuant to its discretion under section 6(2) of the Act and pending the final resolution of the composition of the bargaining unit, hereby certifies the Toronto Printing Pressmen & Assistants' Union Local No. 10, subordinate to G.C.I.U. as bargaining agent for a bargaining unit described as follows:

all employees of the respondent in the Municipality of Metropolitan Toronto, save and except *foremen*, production manager, persons above the rank of *foreman* and production manager, office and sales staff, and persons regularly employed for not more than 24 hours per week.

25. A formal certificate must await the final determination of the bargaining unit.

0807-85-R; 0808-85-M The International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, Applicant, v. **John Hayman & Sons Company, Limited**, and Ontario and King Limited, Respondents

Bargaining Rights - Construction Industry - Reconsideration - Whether certificate of accreditation and subsequent operation of province-wide bargaining provisions of Act had effect of binding employer to current province-wide agreement

BEFORE: *N. B. Satterfield*, Vice-Chairman, and Board Members *J. Wilson* and *L. C. Collins*.

DECISION OF THE BOARD; November 13, 1986

1. The Board has received a request from the solicitors for the applicant for reconsideration of its decision in these matters. Since the parties had agreed that the application in Board File No. 0808-85-M be adjourned *sine die* pending disposition of the application in Board File No. 0807-85-R, the Board's decision related to the latter application. This is an application made pursuant to sections 1(4) and 63 of the *Labour Relations Act*. The Board's decision was with respect to a narrow issue relating to whether the applicant had bargaining rights for ironworkers employed by the respondent John Hayman & Sons Company, Limited ("Hayman") on structural steel work pursuant to the provincial agreement between the Ontario Erectors Association and the ironworkers designated employee bargaining agency. The Board had accepted the parties' request to decide that issue before proceeding further with the application. To that end, the parties agreed that the Board should assume, without finding, that the article set out below established bargaining rights for the applicant respecting ironworkers employed by Hayman on structural steel erection. The article is contained in the collective agreement for rodmen between the applicant and the London and District Construction Association ("the Construction Association"), in effect from May 1, 1971 to April 30, 1973 to which Hayman was bound. The issue is whether those bargaining rights, through a chain of events leading up to the first and subsequent ironworkers (not rodmen) provincial agreements, have operated to bind Hayman to the ironworkers provincial agreement in effect at the time these applications were made.

2. The Board found that Hayman had not become bound to the ironworkers provincial agreement as a result of the bargaining rights assumed to have been established by Article 29 in the 1971-73 collective agreement between the applicant and the Construction Association.

3. The letter requesting that the Board reconsider its decision reads in substantial part as follows:

This request for reconsideration is based on the failure of the Board in its Decision to consider the arguments advanced by counsel in the course of the Board hearing. The aspects of the representations which were not dealt with at all in the course of the Decision are as follows:

- (a) At the time of the making of the Application for Accreditation, there had been no abandonment of steel erection bargaining rights set forth in Article 29 in the succession of collective agreements from 1965 to 1971. Hence, such bargaining rights, if voluntarily recognized upon a true construction of Article 29, remained in effect at the time of the subject Application for Accreditation and thereafter within the Provincial Bargaining provisions of the Act;
- (b) in the alternative, if the Board considered the Union's bargaining rights to have been abandoned by the omission of Hayman from the list of employers filed in the Application for Accreditation, then such rights were voluntarily recognized anew by the inclusion of Article 29 within the terms of the 1973-75 Collective Agreement.

No Abandonment of Bargaining Rights prior to the 1973-75 Collective Agreement

The parties acknowledged before the Board that a series of collective agreements from 1965 to and including the Collective Agreement May 1, 1971 until April 30, 1973 contained the operative provision creating steel erection bargaining rights in Article 29, subject to the Board construing the said provisions. The Board acknowledges in its Decision that,

'The bargaining rights of a trade union under a Collective Agreement flow from the Agreement and remain in effect until they are terminated by the Board (see the Board's Decision in *Dravo of Canada Limited* [1977] O.L.R.B. Rep. Sept. 568 at para. 10), or are voluntarily abandoned by the trade union.'

Further, the Board notes that the Applicant argued the continuation of bargaining rights and the inapplicability of the principle of abandonment by citing the decisions of the Board in *Newman Bros. Limited* [1981] O.L.R.B. Rep. June 750; *Culliton Brothers Limited* [1982] O.L.R.B. Rep. Mar. 357; and *Thomas Construction (Galt) Limited* O.L.R.B. File No. 0035-82-M, unreported, July 9, 1982. The Board however failed to deal with the argument and applicability of these cases to the principle of abandonment and its inter-relationship with the Accreditation and Provincial Bargaining provisions of the Act.

Clearly, the parties acknowledged that Hayman at all material times prior to the current grievance either performed steel erection with its own employees or sub-contracted such work in accordance with the terms and conditions of the operative steel erection collective agreements. Accordingly, there is no evidence upon which the Board can base a determination of voluntary abandonment of bargaining rights. Nor did the Board explicitly rule in the Decision that such abandonment had taken place.

As admitted before the Board, Hayman was omitted inadvertently from the lists prepared in the course of the Accreditation Application and accordingly was omitted from the Accreditation Certificate. It is respectfully submitted that inadvertence cannot constitute voluntary abandonment.

Accordingly, it is our submission that prior to 1971 bargaining rights in respect of steel erection were created through Article 29 and continue in the operative Accreditation Collective Agreements current to 1978 and thereafter with the advent of Provincial Bargaining and have not been abandoned. The Board Decision in fact specifically denies that the Applicant abandoned its bargaining rights with respect to steel erection by stating,

'On the contrary, to whatever extend [sic] Article 29 created any bargaining rights, the Board finds that those bargaining rights *existed* in the 1971-73 collective agreement and were *preserved* by renewal of that collective agreement in the form of the 1973-75 agreement between the Construction Association and Local 700.'

[emphasis in original]

The Board therefore must now undertake the true construction of Article 29 to determine whether that provision does in fact create steel erection bargaining rights.

It is acknowledged that much of the time taken in our arguments before the Board was spent on the inter-relationship between the Application for Accreditation, the renewal of the 1973-75 Rodmen Collective Agreement binding upon Hayman and the proper interpretation of the Accreditation provisions of *The Labour Relations Act* focusing upon the words,

'... And for such other employers for whose employees the trade union or council of trade unions may, *after the date of the making of the application*, obtained bargaining rights through certification or voluntary recognition...'

[emphasis in original]

contained in Section 127(2) of the Act. The Board however must deal with the primary argument of the Applicant although straight forward and less time-consuming.

Voluntary Recognition Under Article 29 of the 1973-75 Collective Agreement

If the Board considers the Applicant's bargaining rights to have been abandoned by the omission of Hayman in the list of employers filed in the Accreditation Application, then it is respectfully submitted that such bargaining rights were voluntarily recognized or restored by means of the 1973-75 Collective Agreement.

The Board acknowledges, in its Decision,

'There is little room for dispute that, if the facts establish the sequence of events described by counsel for Local 700, the bargaining rights established by Hayman's alleged voluntary recognition of Local 700 following the Erectors Association Application for Accreditation, would be preserved in the current Ironworkers Provincial Agreement and Hayman would be bound to it. The linchpin of counsel's argument is that Hayman, when it became bound through its agent the Construction Association to the 1973-75 Collective Agreement between that Association and Local 700, voluntarily recognized Local 700 as the bargaining agent for Hayman's employees covered by that Agreement.'

The Board and the parties reserved the construction of Article 29 to the second phase of hearing if necessary. Accordingly the Board cannot conclude that Article 29 does not constitute voluntarily recognition as it appears in the 1973-75 Collective Agreement. The Board found that Article 29 as contained in the 1973-75 Collective Agreement was simply a renewal of bargaining rights current from 1965 through to 1973. The Board cannot simply dismiss this argument by simply stating,

'If Article 29 does constitute a voluntary recognition, Local 700 acquired its bargaining rights prior to the Application date [Application for Accreditation].'

The Board specifically agreed to defer the construction of Article 29 and its interpretation within the context of any operative collective agreement until the second phase of the case. Accordingly, it is respectfully submitted that the Board ought to reconsider its Decision dated April 10, 1986 and confirm the existence of rights under Article 29 which may, upon construction of the said clause, constitute voluntary recognition of steel erection bargaining rights held by the Applicant Ironworkers, Local 700 in respect of employees of John Hayman & Sons Company, Limited.

4. The Board disagrees that its decision fails to deal with the arguments made in the hearing by counsel for the applicant. The applicant's primary theory of the case is set out at paragraph 6 of the decision [now reported at [1986] OLRB Rep. April 513]. The Board's analysis of that theory is set out at paragraphs 8 through 11, particularly paragraphs 8 and 11. The Board's analysis and conclusion can be summarized by reference to the following sequence of events:

- (1) On March 20, 1971, the applicant and the Construction Association signed a collective agreement to be effective from May 1, 1971 to April 30, 1973 containing the Article 29 quoted above.
- (2) On June 15, 1972 the Ontario Erectors Association applied for accreditation as the bargaining agent for all employers who employed ironworkers represented in collective bargaining by the applicant.
- (3) On April 1, 1973 the applicant and the Construction Association signed a renewal of the agreement in item (1) to be effective from May 1, 1973 to April 30, 1975, containing the same Article 29.
- (4) On May 31, 1974 the Board issued a decision accrediting the Ontario Erectors Association as bargaining agent for all employers of ironwork-

ers for whom the applicant had bargaining rights. Paragraph 14 of the decision and the certificate of accreditation issued to the Ontario Erectors Association both list the names of the employers who were included in the unit of employers for which the certificate was issued.

5. The effect of that sequence of events can be described as follows. The 1971-73 collective agreement by operation of Article 29 contained bargaining rights for the applicant with respect to ironworkers performing structural steel erection employed by Hayman. Those bargaining rights were in effect on June 15, 1972 when the Ontario Erectors Association made its application for accreditation. Therefore Hayman's name should have appeared on the list of employers for whom the applicant herein claimed bargaining rights and which it was obliged to file with the Board in response to the accreditation application. Subsequent to the application for accreditation, on April 1, 1973, the applicant and the Construction Association signed the renewal agreement to be effective May 1, 1973 until April 30, 1975. Article 29 continued in that agreement without change. Hayman was still bound to the collective agreement. Thus the bargaining rights contained in the 1971-73 collective agreement continued uninterrupted in the 1973-75 agreement. As of May 1, 1973 when the collective agreement became effective, no decision had been made with respect to the application for accreditation. The decision issued May 31, 1974. Paragraph 18 of the decision provides that a certificate of accreditation be issued to the Ontario Erectors Association for the employers in the bargaining unit described in paragraph 4 of the decision in terms of employers of ironworkers for whom the applicant has bargaining rights. Paragraph 14 of the decision lists those employers. The certificate of accreditation lists the same employers as being covered by the certificate. Hayman's name is on neither list. Paragraph 18 also provides that the bargaining unit includes, pursuant to [section 127(2)] of the Act, "... such other employers for whose employees the respondent may after June 15, 1972, obtain bargaining rights through certification or voluntary recognition...".

6. The applicant argues that Hayman was captured by that "basket" provision in the certificate of accreditation because Hayman had voluntarily recognized the applicant when Hayman became bound to the 1973-75 collective agreement between the applicant and the Construction Association. That would be correct if no bargaining rights existed prior to the signing of the agreement on April 1, 1973. The fact is that bargaining rights already existed in the predecessor 1971-73 collective agreement. As the Board stated at paragraph 8 of its decision in these matters:

... Those bargaining rights were continued in the 1973-75 agreement. The bargaining rights of a trade union under a collective agreement flow from the agreement and remain in effect until they are terminated by the Board (see the Board's decision in *Dravo of Canada Limited*, [1977] OLRB Rep. Sept. 568 at para. 10), or are voluntarily abandoned by the trade union. Therefore, it cannot be said that the act of Hayman becoming bound to the 1973-75 collective agreement was an act of voluntarily recognizing [the applicant] as bargaining agent for Hayman's ironworkers. On the contrary, to whatever extent Article 29 created any bargaining rights, the Board finds that those bargaining rights existed in the 1971-73 collective agreement and were preserved by renewal of that collective agreement in the form of the 1973-75 agreement between the Construction Association and [the applicant]....

7. The facts agreed to by the parties which are set out in paragraph 4 of the Board's decision did not contain any facts which would allow the Board to conclude that, during the time Hayman was bound to the 1971-73 collective agreement and before becoming bound to the 1973-75 agreement, anything happened which terminated the applicant's bargaining rights with respect to ironworkers employed by Hayman. Nor has the Board made any finding in its decision that the applicant voluntarily abandoned its bargaining rights for ironworkers employed by Hayman during that time. In fact, it is implicit in paragraph 8 of the Board's decision quoted above that there has been no voluntary abandonment of bargaining rights. Therefore, the 1973-75 collective agreement

between the applicant and the Construction Association cannot be taken as a voluntary recognition by Hayman of the applicant as bargaining agent for the ironworkers employed by Hayman since the applicant already held those bargaining rights at the time the 1973-75 agreement came into effect on May 1, 1973. That is why Hayman was not captured by the “basket” provision of the certificate of accreditation or by operation of section 128(4) of the Act.

8. In the result, since Hayman was not listed by the accreditation decision or the certificate of accreditation as an employer included in the unit of employers bound by the certificate and, further, is not included by operation of section 128(4) of the Act, Hayman was not bound by the certificate of accreditation issued to the Ontario Erectors Association and the Ontario Erectors Association did not become bargaining agent for Hayman respecting ironworkers engaged in the erection of structural steel. It follows, therefore, unless Hayman did something else to bind it to the collective agreements subsequently entered into between the Ontario Erectors Association and the applicant, Hayman was not bound by those agreements. There are no facts before the Board of Hayman doing anything else which would have bound it to those agreements. That being the case, when the bargaining rights of the Ontario Erectors Association and the applicant were subsequently subsumed into the first ironworkers provincial agreement, they did not include any bargaining rights held by the Ontario Erectors Association respecting Hayman or any bargaining rights held by the applicant respecting ironworkers employed by Hayman.

9. That is why, at paragraph 12 of the Board’s decision in these matters, the Board found “... that John Hayman & Sons Company, Limited was not bound to the current provincial agreement between the Ontario Erectors Association and the Ironworkers Employee Bargaining Agency as a consequence of the certificate of accreditation which was issued to the Ontario Erectors Association on May 31, [1974].”

10. The only issue before the Board was, as set out at paragraph 5 of its decision:

... whether there is a continuum of collective bargaining relationships between Hayman, the Construction Association, the Erectors Association, and Local 700 through to the current provincial agreement which has bound Hayman to it...

The Board’s decision clearly has determined that issue and, in the process, has dealt with all of the applicant’s relevant arguments. Since the Board made no finding of voluntary abandonment by the applicant of its bargaining rights for ironworkers employed by Hayman, and since the applicant was relying on the cases cited at paragraph 7 of the Board’s decision to support its argument that Hayman could not now rely on a defense that the applicant had abandoned its bargaining rights for ironworkers employed by Hayman, it was unnecessary for the Board to deal directly with the applicant’s argument.

11. It is obvious that the matters raised in the applicant’s request for reconsideration were fully argued at the hearing and addressed directly in the reasons for the Board’s decision. Therefore, since the basis of the request for reconsideration is that the Board’s decision failed to deal with the applicant’s argument and, further, given the need for and importance of finality in the Board’s decisions, the Board declines to exercise its discretion under section 106(1) of the *Labour Relations Act* to reconsider its decision in these matters.

2237-86-R; 2336-86-R National Automobile, Aerospace and Agricultural Implement Workers of Canada (CAW-Canada), Applicant, v. **Koehring Canada**, A Unit of AMCA International Ltd., Respondent, v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO-CFL, Lodge #275, Intervener #1, v. International Association of Machinists and Aerospace Workers, Intervener #2; International Association of Machinists and Aerospace Workers, Applicant, v. Koehring Canada, A Unit of AMCA International Limited, Respondent

Certification - Practice and Procedure - Pre-hearing Vote - Subsequent certification application filed before terminal date fixed for first certification application - First applicant requesting a pre-hearing vote while subsequent one not - Subsequent applicant permitted to amend application to request pre-hearing vote

BEFORE: *Owen V. Gray*, Vice-Chairman, and Board Members *I. M. Stamp* and *H. Kobryn*.

DECISION OF THE BOARD; November 28, 1986

1. In Board File No. 2237-86-R, the applicant applied on November 4, 1986, for certification as exclusive bargaining agent for a unit of employees of the respondent presently represented in collective bargaining by intervener #1. In its application, the applicant in that file requested that a pre-hearing representation vote be taken. The terminal date fixed for that application was November 18, 1986.

2. On November 17, 1986, intervener #2 applied in Board File 2336-86-R for certification with respect to the same bargaining unit of employees of the respondent. It did not initially request in its application that a pre-hearing representation vote be taken. This latter application is a "subsequent application" within the meaning of subsection 103(3) of the *Labour Relations Act* ("the Act"), which provides:

103.-(3) Notwithstanding sections 5 and 57, where an application has been made for certification of a trade union as bargaining agent for employees in a bargaining unit or for a declaration that the trade union no longer represents the employees in a bargaining unit and a final decision of the application has not been issued by the Board at the time a subsequent application for such certification or for such a declaration is made with respect to any of the employees affected by the original application, the Board may,

- (a) treat the subsequent application as having been made on the date of the making of the original application;
- (b) postpone consideration of the subsequent application until a final decision has been issued on the original application and thereafter consider the subsequent application but subject to any final decision issued by the Board on the original application; or
- (c) refuse to entertain the subsequent application.

3. When a subsequent certification application is filed on or before the terminal date fixed for the original certification application, and neither applicant requests a pre-hearing representation vote, the Board usually takes the approach described in paragraph (a) of subsection 103(3) and consolidates the processing and hearing of both applications, treating the subsequent application as though it were an application for certification by intervener under sections 10 and 11 of

the Board's Rules of Procedure. The same approach can be taken when both applications request that a pre-hearing vote be conducted. In both situations, each applicant's membership support is assessed with respect to persons employed in the appropriate unit as of the date the original application was filed, on the basis of written membership evidence filed by the terminal date fixed in the original application. When the applications are regular applications, membership support among those persons is assessed as of the date fixed under subsection 7(1) and clause 103(2)(j), which is usually the terminal date fixed in the original application. When the applications are "pre-hearing" applications, however, membership support must be assessed under subsections (2) and (4) of section 9 as of the date the original application was filed, and not the later terminal date. Simply put, cards signed after the application date do not count in a pre-hearing application, even if they have been filed by the terminal date. Because of this potentially critical timing difference, it is more likely in pre-hearing cases than in ordinary cases that a subsequent applicant might not want the Board to proceed under section 103(3)(a). The subsequent applicant's wishes are, of course, a relevant consideration in the exercise of the Board's discretion under subsection 103(3).

4. For reasons set out in *Bio Shell Inc.*, [1983] OLRB Rep. Mar. 318, the Board would not exercise its discretion in the manner contemplated by paragraph (a) of subsection 103(3) to consolidate a proceeding in which there was to be a pre-hearing vote with one in which there was not. In *Bio Shell*, the original application was a regular application; the subsequent application, which had been filed before the terminal date in the original application, requested a pre-hearing vote. The Board exercised its discretion under subsection 9(2) not to direct a pre-hearing vote in the subsequent application, thereby converting it into a regular application, and consolidated the applications.

5. This case initially presented the reverse of the situation in *Bio Shell*: the original application requested a pre-hearing vote, while the subsequent application, as filed, did not. Had that remained so, we could have consolidated these proceedings only by denying the *first* applicant's request for a pre-hearing vote. Otherwise, we would have had to postpone consideration of the second application. While we would have been inclined to adopt the latter course, it became unnecessary to make that difficult choice. In response to the Board's request to it for submissions on these matters, intervener #2 asked to amend its application to request a pre-hearing representation vote and, further, asked that the Board exercise its discretion under subsection 103(3) in the manner contemplated in subparagraph (a) thereof. Both requests are hereby granted.

6. Having permitted the amendment of the subsequent application to include a request for a pre-hearing representation vote and exercised our discretion under 103(3) to treat the subsequent application as having been made on the date of the making of the original application, these two proceedings are hereby consolidated and shall hereafter continue under the style of cause in Board File 2237-86-R as though intervener #2 had made an intervener's application for certification therein. For reasons set out in the Board's decision in *Starways Distributors*, [1986] OLRB April 561, the employees affected by these proceedings are entitled to notice of the application for certification by intervener #2. The Registrar is directed to prepare a notice to employees of that application in Form 7, suitably modified, and to forward an appropriate number of copies thereof to the respondent for posting together with the notice of taking of vote with respect to the representation vote hereinafter directed.

7. It appears to the Board on an examination of the records of the applicant and the records of the respondent that not less than thirty-five percent of the employees of the respondent in the voting constituency hereinafter described were members of the applicant at the time the application was made.

8. It also appears to the Board on an examination of the records of intervenor #2 and the records of the respondent that not less than thirty-five percent of the employees of the respondent in the voting constituency hereinafter described were members of intervenor #2 at the time the original application was made.

9. The parties agree that the appropriate voting constituency and bargaining unit in this matter is the unit of employees presently represented by intervenor #1 in collective bargaining with the respondent. As that unit is described somewhat inelegantly in the existing collective agreement between intervenor #1 and the respondent, the respondent and trade unions party to these applications agree that the unit represented by intervenor #1 can be described as follows:

all employees of the respondent at Brantford, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, field service representatives, field engineers, students employed during the school vacation period, and those employees covered by collective agreements between the respondent and the International Association of Machinists and Aerospace Workers.

For reasons set out in the Board's decision in *Niagara South Board of Education*, [1985] OLRB Rep. Jan. 90, the Board is disinclined to adopt exclusionary language such as "employees covered by collective agreements between the respondent and the International Association of Machinists and Aerospace Workers" in defining a voting constituency or bargaining unit. We prefer "employees in any bargaining unit for which the International Association of Machinists and Aerospace Workers held bargaining rights as of November 4, 1986."

10. In these circumstances, the Board directs that a pre-hearing representation vote be taken of the employees of the respondent in the following voting constituency:

all employees of the respondent at Brantford, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, field service representatives, field engineers, students employed during the school vacation period, and employees in any bargaining unit for which the International Association of Machinists and Aerospace Workers held bargaining rights as of November 4, 1986.

11. All employees of the respondent in the voting constituency on November 24, 1986, who have neither voluntarily terminated their employment nor been discharged for cause between that date and the date the vote is taken will be eligible to vote. Voters will be asked to indicate whether they wish to be represented by the applicant, intervenor #1 or intervenor #2 in their employment relations with the respondent.

12. The matter is referred to the Registrar.

3181-85-U Patty Konkle, Complainant, v. Tridon Employees' Union, Respondent

Duty of Fair Representation - Unfair Labour Practice - Employer agreeing to accept seniority grievance of complainant but only on condition union would not grieve on behalf of any other employees moved down on seniority list as a result - Union refusing to pursue grievance on this condition - Whether union balanced interests of complainant and other members of bargaining unit

BEFORE: *Patricia Hughes*, Vice-Chairman.

APPEARANCES: *Brent Foreman* and *Patty Konkle* for the complainant; *C. Hillmer* and *Joyce Chadbolt* for the respondent.

DECISION OF THE BOARD; November 14, 1986

1. This is an application under section 68 of the *Labour Relations Act* ("the Act") in which the complainant, Patty Konkle, alleges that the respondent union ("the union") contravened section 68 by failing to pursue her grievance relating to the extent of her seniority for purposes of lay-off.

2. The complainant, Patty Konkle, began working for Tridon Limited ("Tridon" or "the company") in May, 1976, at its Oakville location as an accounts payable clerk (Tridon also has a Burlington location). On August 27th, 1984, as a consequence of dissatisfaction with her salaried position, she transferred to the bargaining unit and became a machine operator in the plant. She was laid off from February 1985 until June 1985 and again in August 1985 for two weeks. At a union meeting held on November 23, 1985, Ms. Konkle became aware that she might be laid off again. She looked at her collective agreement and, as a consequence of Article 6.06 of the collective agreement, believed that her seniority in the plant should include the time she spent in her salaried position. She discussed the matter with her union representatives who were of the belief that that article did not apply to her. The union did file a grievance on behalf of Ms. Konkle on January 24th, 1986, but subsequently withdrew it. When she believed that she was not receiving any satisfaction from the union, she brought this application under section 68 of the Act.

3. Section 68 of the Act reads as follows:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

4. It is particularly important in light of the issue in this application (that is, the interpretation of a clause of the collective agreement), that my task be understood clearly. It is not my responsibility to interpret the collective agreement. It is not my responsibility to determine the merits of any grievance filed on behalf of Ms. Konkle. It is my task to determine whether or not the union has acted in a way which contravenes section 68 of the Act, that is, whether the union has acted in a manner which is discriminatory, in bad faith or arbitrary. Insofar as the complainant did not pursue any allegation of discrimination, I must decide whether the union has acted in bad faith or arbitrarily towards Ms. Konkle.

5. It is now well established that the test in section 68 cases is not whether the union made the "right" decision in not acting in accordance with the complainant's wishes, but whether the union acted reasonably in doing so. A union is by definition a collective entity and while the inter-

ests of the individual members, as individuals, cannot be ignored, they must be assessed in conjunction with the interests of and the union's obligations to the collectivity.

6. A union will be considered to have acted in an arbitrary manner if its officials have acted capriciously, unreasonably or, put another way, if they have failed to direct their minds to the complainant's concerns: *Diamond "Z" Association*, [1975] OLRB Rep. Oct. 791; *De Havilland Aircraft of Canada Ltd.*, [1979] OLRB Rep. Oct. 933; *Leonard Murphy*, [1977] OLRB Rep. March 146. The union is allowed to be wrong in its judgment, and even negligent, but it cannot dismiss a complainant's request out of hand, nor can a course of conduct be "so reckless to be unworthy of protection": *CUPE, Local 1000*, [1975] OLRB Rep. May 444; *Royal Ontario Museum*, [1980] OLRB Rep. Jan. 106. As the Board said in *Savage Shoes Ltd.*, [1983] OLRB Rep. Dec. 2067 at paragraph 38:

Where it is difficult to see a rational pathway between the facts and circumstances said to have been taken into account and the interests said to have been balanced on the one hand, and the result on the other, then there arises a rebuttable presumption that the decision was arbitrary.

A union does not act in an arbitrary manner merely by failing to file a grievance; section 68 does not require that a union file a grievance in every case, but it does require that its decision not to file one has been taken after consideration of relevant factors and is not based on irrelevant factors.

7. In *Leonard Murphy*, *supra*, the Board stated that bad faith requires evidence of union hostility towards the grievor or motivation by factors extraneous and counter to legitimate bargaining concerns. The outer limits of this head of section 68 was set out in *Steinberg's Ltd.*, [1972] OLRB Rep. May 423, at paragraph 12:

We are not concerned here with whether or not [the union's conclusion that they could not win the grievance was] a correct decision. As was said by the Board in *Rutherford's Dairy Limited*, [1972] OLRB Rep. (March), '... a union may make a mistake in the manner in which it represents employees; however, if that mistake was made in good faith and without *mala fides*, it cannot be found that the union has violated the provisions of section [68]'.... The section does not impose an absolute duty on the union to carry every grievance filed by an employee through to the arbitration process.

8. Both counsel agreed that the Board's decision in *Dufferin Aggregates*, [1982] OLRB Rep. Jan. 35, applies to this case. In that case, the Board stated, as it has elsewhere, that

20. Under the *Labour Relations Act* ... decisions [which have a serious economic impact on individuals] are lawful so long as they are not arbitrary, discriminatory or in bad faith within the meaning of section 68 of the Act. In the knowledge that unions are commonly required to make hard decisions affecting their members, those words have been deliberately chosen by the Legislature to avoid undue interference in the internal affairs of trade unions....

21. There is nothing inherently unlawful in a union making a decision that favours a group of employees over another. From the earliest decisions interpreting section 68 of the Act the Board has recognized the need for unions to have the latitude to make decisions that may favour certain employees at the expense of others.

But the Board also takes the view that the union is required to go through a process of balancing the rights of individuals or of a specific minority of employees and those of the majority of employees. That is the issue which is at the forefront of this case. To summarize what has already been said, the test (as enunciated in *Dufferin Aggregates*, at paragraph 37) is as follows:

The Board should not ask whether the decision is right or wrong or whether it agrees with it -- rather it should ask whether it is a decision that could reasonably be made in all of the circumstances, even if the Board might itself be inclined to disagree with it. Used in this sense 'reason-

able' must mean by the rational application of relevant factors, after considering and balancing all legitimate interests and without regard to extraneous factors.

9. In the *Dufferin Aggregates* case, *supra*, at paragraph 28, the Board indicated the importance of seniority rights to an employee:

The weight of authority supports the view put forward by counsel for the complainants that special considerations attach to any decision by a union that alters or abrogates the job security of employees. That is especially true in relation to seniority rights. Seniority rights, built up over time, usually over a number of successive collective agreements, represent an employee's stake in critical interests such as promotion, pension rights and his rights of layoff and recall. The concept of seniority comes as close as any to approximating a form of industrial relations property right for the individual employee, and its consideration by labour boards in fair representation complaints is particularly instructive.

While in the instant case, the complainant did not actually possess seniority rights which were then abrogated by a union decision (her position being that she should have been acknowledged to possess them), her seniority rights were at issue and the union's interpretation of the relevant clause in the collective agreement and its decision not to pursue a grievance on behalf of the complainant, has the result of leaving the complainant with low seniority and high vulnerability to layoff. Counsel for the union concedes that where such a right is involved, the union has a particular obligation to act in an appropriate manner on behalf of the complainant. However, it must be understood that the interest competing with those of the complainant also involves seniority rights, the seniority rights of persons who were already members of the bargaining unit when the complainant transferred from salary to the bargaining unit position.

10. The collective agreement states that it is between Tridon Limited and Tridon Employees' Union, "a union representing those other than salaried employees and supervisors". The relevant clause in the collective agreement reads as follows:

6.06 Company seniority will remain unaffected in any employee transfer.

In brief, the complainant's position is that this clause means that the time she spent in the salaried position should have been carried by her into her bargaining unit position, so that she began her time in the bargaining unit with 8-1/2 years seniority. The complainant argues that because she was not placed on probation when she transferred to the bargaining unit, earned the full rate immediately and began paying union dues immediately, and also carried with her her benefits and vacation time, that the employer was in fact considering that she was carrying her seniority. The union takes the position that these benefits enjoyed by the complainant were as a consequence of her service with the company, not as a consequence of any seniority and that all of them (except vacation and perhaps some benefits) were a special privilege granted to Ms. Konkle by the employer because of her lengthy service. This view is supported by the testimony of Heather Crowe, Tridon's Personnel Administrator at Oakville, who interviewed Ms. Konkle for the salaried position. The union's position is that Article 6.06 applies only to bargaining unit employees and refers to company-wide seniority as opposed to departmental seniority. Thus an employee in a particular department, while being laid off in that department, may then "bump" an employee in another department who has less company-wide seniority. In other words, company seniority applies to the time spent in the bargaining unit in all departments, while departmental seniority applies to the time spent in the particular department, which of course in many cases would be less than the company seniority enjoyed by the employee.

11. Another provision of the collective agreement which is relevant is Article 6.07 which indicates that an hourly-rated employee, or member of the bargaining unit, who transfers to the salaried group has twelve months to decide whether or not he or she wish to return to the bargain-

ing unit. When the employee returns to the bargaining unit, his or her seniority is that 'accumulated prior to the transfer to the salaried group'. Such an employee would not acquire or accumulate seniority while in the salaried position. Read in conjunction with section 6.06, Article 6.07 suggests it is not unreasonable to interpret Article 6.06 in the manner articulated by the union.

12. Ms. Konkle testified that when she met with representatives of management to discuss her transfer, there was no discussion of seniority. However, Ms. Crowe's evidence is that she did raise the matter with Ms. Konkle because she did not want to see Ms. Konkle laid off after the time she had spent with the company. She said Ms. Konkle replied that she would be earning more in the bargaining unit and it would be worth the risk. Ms. Konkle also testified that she told the union about her interpretation of Article 6.06. The union representatives she spoke to, including the President of the union, Ron Billings, the Vice-President at the Oakville plant, Joyce Chadbolt, and other representatives, were of the view that Article 6.06 did not apply to Ms. Konkle's situation. However, Joyce Chadbolt got in touch with the union's lawyer to seek an opinion about the meaning of Article 6.06. On the basis of the letter received from the lawyer, the union decided that for purposes of lay-off Ms. Konkle was entitled only to her seniority since she began working in the bargaining unit. Ms. Konkle filed a grievance on January 24th and the union initially pursued that grievance, by passing it along to management. Shortly thereafter, however, the union discovered that the employer would accept the grievance, contrary to its expectations and previous discussions with Dan Krzewski, the company's Director of Human Resources, and the union retrieved the grievance. Mr. Krzewski apparently stated that the grievance would be accepted on the condition that the union agreed not to grieve on behalf of any employees who were moved down the seniority list by the placement of Ms. Konkle on the list, a condition unacceptable to the union. Ms. Konkle was informed that the union was not going to pursue the matter, but it was not explained to her that the grievance was filed and withdrawn because the company indicated it would accept the grievance. No other grievance ever was filed on behalf of Ms. Konkle. However, the union did pursue the matter in other ways, by seeking precedents of employees who had transferred from salaried to bargaining unit in order to see how their seniority had been treated. They found no examples of employees who had transferred from salaried to bargaining unit and had taken their salaried service into the bargaining unit as seniority.

13. With respect to the allegation that the union has acted in bad faith, I find no evidence which will support an allegation that the union has acted in a hostile manner towards Ms. Konkle. She admitted that many of the conversations with Mr. Billings, Ms. Chadbolt and other union representatives, were normal conversations, with no hostility, although she indicated that at times other conversations involved a certain amount of exasperation or annoyance. I do not consider that annoyance or exasperation equate to bad faith or hostility and I find none in the way in which the union treated Ms. Konkle.

14. The real issue, therefore, is whether or not the union acted in an arbitrary manner. I find the union's interpretation of the collective agreement to be reasonable, and certainly not "perverse" in the sense that it could be called arbitrary. However, that does not end the matter, but is one factor in considering the nature of the union's treatment of Ms. Konkle. In obtaining a legal opinion about the interpretation of the clause and about various options available to it, the union has gone a long way to rebutting any allegation that it has acted in an arbitrary manner. While it may not always be the case that a legal opinion is such that it assists the union in this way, in this case the opinion is far from perfunctory and set out options, one of which was chosen by the union. The importance of obtaining a legal opinion is indicated by the Board in *George Lazenkas*, [1983] OLRB Rep. Jan. 72 where it said:

Acting in accordance with its usual practice, the union submitted the grievance to its legal counsel, and, based upon this advice, decided not to pursue the grievance to arbitration. It has been

recognized by the Board on previous occasions that this type of consultation can resolve in the union's favour any allegation of breach of section 68 insofar as the processing of grievances is concerned

15. The letter dated January 15th, 1986, from A. M. Hillmer to Ron Billings, President, Tridon Employees' Union, indicates Mr. Hillmer's view of the way in which arbitrators have approached the question of an employee's seniority when the employee is transferred from a position outside the bargaining unit to one inside the unit. In that letter, Mr. Hillmer states that where an employee is employed outside the bargaining unit and subsequently transfers into the bargaining unit, "the cases are divided. In the absence of Collective Agreement language to the contrary, we feel the trend is to allow employees to retain and use non-bargaining unit seniority when they enter the bargaining unit". However, Mr. Hillmer then examines the collective agreement between Tridon and the union to indicate that there is language throughout the agreement which distinguishes between employees in the bargaining unit and non-bargaining unit employees and between years of service and seniority. The letter then concludes that

the Collective Agreement and the case law relevant to this matter supports, on balance, the proposition that seniority for the purpose of layoff, recall, promotion and transfer is seniority accumulated while employed *within* the bargaining unit. We do not see the existing collective agreement language, which clearly shows the intention of the Union and the employer, allowing an arbitrator to come to any other logical conclusion.

[emphasis in original]

The letter suggests that the experience of other employees, if there are any employees in the same situation, might be useful and in fact the union did investigate whether or not there were other employees in the same situation as Patty Konkle.

16. In a subsequent letter, dated January 15th, 1986, Mr. Hillmer brings the union's attention to an arbitration award which is supportive of the union's position. He then goes on to set out ways in which the matter might be approached. One option, if Patty Konkle alleges improper lay-off, would be to pursue the grievance as it would pursue any grievance. At that time, "[t]he discussion should focus on the merits of the matter in such a manner as the context allows given the Union's and the employer's position". He also suggests that the matter might go before a general membership meeting. He raises the possibility that Ms. Konkle might bring a section 68 complaint under the *Labour Relations Act*. Finally, Mr. Hillmer suggests one option is to settle the grievance between the union and the employer, allowing Ms. Konkle to use her total service by making a "without prejudice" decision, but goes on to "caution against this approach as it will result in another bargaining unit employee being laid off who has greater bargaining unit seniority than Patti Konkle". After considering these various options, Mr. Hillmer indicates that probably the preferable approach would be to pursue the grievance. As already indicated, the union did in fact decide to pursue the grievance, but on the understanding that the employer would reject it. Instead, the employer indicated that it would accept the grievance on condition that no other grievances arising out of this resolution of Ms. Konkle's grievance would be filed by the union. This condition the union refused to accept.

17. In this situation, the union was faced with a choice of harming the interests of Ms. Konkle or of other employees; it could not settle this matter without there being a detrimental effect on someone. If the union pursued the grievance and was successful, Ms. Konkle's seniority would increase by over 8 years and she would no doubt bump someone on the seniority list. Thus other employees would be laid off before Ms. Konkle would be laid off, even though all their time had been spent in the bargaining unit and they had been paying union dues. (If the union were unsuccessful in pursuing the grievance, of course, Ms. Konkle would feel that everything had been done

that could be done and she and other employees would be in the same position as if the union had not filed a grievance.) If the union did not file a grievance, Ms. Konkle would be subject to early lay-off (and has apparently been laid off since this hearing first began). It is clear that the union weighed these two approaches. Ms. Konkle admitted on cross-examination that Mr. Billings told her that he had two people with rights and if he helps one, he hurts another and that he has to choose. She agreed that he said that but she said "I had a right to look out for number one". Nor, it seems, was the union entirely without sympathy for Ms. Konkle. Ms. Chadbolt testified that she did consider whether it would be possible for Ms. Konkle to return to the salaried unit and thereby remove herself from the layoff list.

18. The issue was discussed at several union executive meetings and at several meetings in which representatives and members of the executive were present. The legal opinion was available for the executive to make a decision and the facts of the case were put before both the representatives and the executive. The executive and representatives voted not to proceed with the grievance. The matter was never taken to a general membership meeting, Gay Murphy, a Burlington union representative at the relevant time, testified that the union did not generally take such matters to the general membership meeting. Nor did Ms. Konkle attend any of these meetings in order to put her own case. Ms. Murphy did indicate that if Ms. Konkle had asked, she would have been able to meet with any of the committees, but it is not clear that she was ever informed of that. With respect to the opinion letter, Ms. Konkle was given a copy of it but no one attempted to explain it to her. The union representatives understood that she had sought legal advice herself by that time.

19. Ms. Konkle's counsel submitted that the union did not attempt to balance the interests of Ms. Konkle and of the other members of the bargaining unit. I have found that such a balancing was attempted. He also argued that Ms. Konkle never received a reasonable answer from Mr. Billings. I find that the union's position was clear. Ms. Konkle's counsel further argued that the union's approach amounted to a unilateral change to the collective agreement because the provision clearly means what Ms. Konkle says it means, but in my view, this is not an appropriate way to view the matter. The clause is not clear on its face, although when seen in the context of the entire collective agreement, I find greater support for the union's interpretation than for Ms. Konkle's interpretation. Accordingly, it can equally be argued that the union was in fact supporting the *status quo*, not attempting to amend the agreement. On the other hand, counsel argues that if the provision is ambiguous, the union should have attempted to clarify the meaning of article 6.06 at arbitration by using Ms. Konkle's grievance as a "test case"; even if that is so, a failure to select that route does not in itself constitute a contravention of section 68. This is all the more the case when the union's position appears to follow past practice and has support in arbitral decisions.

20. Considering all the efforts the union made with respect to Ms. Konkle's concern about the extent to which she enjoyed seniority, I find that it has not breached section 68 of the Act and the complaint is hereby dismissed.

1268-84-R Ontario Secondary School Teachers' Federation, Applicant, v. Lincoln County Board of Education, Respondent

Adjournment - Certification - Practice and Procedure - Parties agreeing to an adjournment *sine die* pending the determination of certain test cases - Test cases not concluded by end of one year period of adjournment - Remaining certification applications scheduled for hearing

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members W. H. Wightman and B. L. Armstrong.

DECISION OF THE BOARD; November 10, 1986

1. This is an application for certification. It is one of a large number of similar applications in which the applicant, OSSTF, sought to represent various categories of "teacher" who were not ostensibly covered by the *School Boards and Teachers Collective Negotiations Act, 1975* ('Bill 100'), and who, therefore, were covered by the *Labour Relations Act*. These apparently unrepresented teachers were of various kinds, including: "occasional teachers" who fill in, as needed, when the regular teacher is absent, summer school teachers, and night school teachers. In the case of the summer and night school instructors, there was the added complexity that the programmes in which they taught might include both credit and non-credit courses, or might be administered in conjunction with a broader "continuing education" programme that employed instructors with no formal certificate of teaching qualification.

2. These applications posed both practical and legal difficulties - not least because the initial spate of applications from OSSTF was quickly followed by applications from other teacher organizations, such as the Ontario Public School Teachers' Federation ("OPS"), which claimed the right to organize other school teachers who, for one reason or another, were beyond the scope of Bill 100. Were these teacher organizations "trade unions" within the meaning of the *Labour Relations Act*? Which "teachers" in the target group were, in fact, covered by the *Labour Relations Act*, and which ones were arguably covered by Bill 100? What was the appropriate bargaining unit? Should the bargaining units determined by this Board under the *Labour Relations Act* mirror the bargaining pattern established under Bill 100? How should one establish the composition of a bargaining unit which, in the case of occasional teachers, would necessarily be composed of persons who only work on a casual basis, and in the case of summer school teachers would involve a group of teachers employed for a limited period of time? What, if anything, should one make of the distinction between "credit" and "non-credit" courses, or between "certified" and "non-certified" teachers? Indeed, how should one even give notice to, or conduct a representation vote of, casual employees with no fixed work place or summer school teachers whose short-term employment may be completed long before the certification proceeding could be concluded? And, of course, despite this surge of applications and obvious employee interest in collective bargaining, there was little established jurisprudence to assist the Board in resolving these questions because this was a new, and in some ways unique, organizing field. In the absence of the agreement of the parties, these issues had to be resolved by litigation.

3. How was that litigation conducted? In our view, quite sensibly. Since many of the cases involved similar issues, the parties were content to proceed with a few of them and adjourn the rest *sine die* in the expectation that three or four cases would be sufficient to establish the guidelines for the disposition of the others. The Board endorsed the record with its "standard form" endorsement, which provided that the matter would be adjourned for a period of one year, and unless before that time the parties notified the Board of their wish to proceed, the application would be

terminated. We say "standard form" endorsement because it is the one usually employed when an application is adjourned on the expectation that it will likely be settled, and one year is ordinarily long enough for the parties to compose their differences, or determine that a Board hearing is necessary. The standard endorsement facilitates the administrative closing of a file when the proceeding has, in fact, been settled, even if the parties do not notify the Board to that effect. That, of course, is not the case here, nor was any step actually taken to close the file or terminate the proceeding. Despite the passage of more than a year, the file rested in an administrative limbo while the other cases proceeded to their conclusion; and, unfortunately the one-year period was unduly optimistic.

4. Two of those cases are of particular interest: *Board of Education for the City of York (No. 1)*, [1984] OLRB Rep. Sept. 1279 and *Ottawa Board of Education*, [1985] OLRB Rep. July 1139. In each of them the Board considered the ambit of Bill 100 and the *Labour Relations Act*, and, thus, its jurisdiction to deal with the application before it. In each case, the Board decided that the subject employees were covered by Bill 100, and the Board was without jurisdiction. On that basis the applications were dismissed. (Paradoxically, in *Ottawa Board of Education*, it was the applicant, OSSTF, which was arguing that the Board did not have jurisdiction to deal with the application that OSSTF itself had brought.) Both cases contain a discussion of the relevant legislation and both are currently the subject of applications for judicial review which have been argued but not yet decided. There is no indication when the Divisional Court decision might be released, or whether that will be the end of the controversy. Given the nature of the issues at stake, it is quite conceivable that one party or the other would seek the opinion of the Ontario Court of Appeal.

5. Counsel for the respondent Boards of Education in these matters, take the position that the applications for certification either have been or should be dismissed in accordance with the Board's original endorsement. In several cases counsel notes the (arguably) incongruous result of having the collective bargaining rights of summer school teachers in 1987, determined by the wishes of summer school teachers employed in 1984; and, he also notes the administrative difficulty in preparing employee lists, and determining the composition of the bargaining unit, based on employment records that are more than two years' old. Counsel for OSSTF argues that the union and its members should not be prejudiced because the parties adopted a sensible procedure from an administrative point of view, or because neither the parties, nor the Board really turned their minds, until recently, to those applications which had been put "on hold", while others were being actively pursued. He argues that the proceedings should continue to be adjourned *sine die* until the release of the Divisional Court decision in *City of York* and *Ottawa Board of Education*.

6. We are not persuaded that we should accede to either of those requests - at least at this stage.

7. There is something to be said for the arguments on both sides - although we might observe, parenthetically, that an employer's administrative convenience is not something which is usually assigned much weight, and the interests of current employees can be adequately accommodated by directing a representation vote if the union is entitled to one. We are more concerned that the parties appear to have agreed to an adjournment *sine die*, pending the determination of certain "test cases", yet having done so, neither of them is urging the Board to resolve the cases held in abeyance in accordance with the principles established in those which have been decided. The respondents point to the one-year period in the Board's endorsement. The union points to the uncertainty generated by the application for judicial review. However, if we were to accept the analysis of the Board in the *Ottawa* case, it is not clear to us why this would not lead to a dismissal for want of jurisdiction rather than the failure to meet the requirements of the Board's earlier endorsement;

and we note, once again, the rather curious position taken by the union in the *Ottawa* case: filing an application for certification, then arguing that the Board has no jurisdiction to deal with it, because the employees are already represented. Having succeeded in having its own application dismissed - a result which the union presumably seeks to have affirmed in the Divisional Court - why should the Board keep these applications alive, but "on hold", against the day when the Divisional Court or some higher authority *might* conclude that the Board's legal analysis was wrong? Certainly, in other contexts, the Board would not grind to a halt when there was a legal challenge to its jurisdiction, nor (in the absence of the agreement of the parties) would it postpone or decline to deal with a matter simply because a Court might later disagree with the Board's legal analysis.

8. In our view, the most appropriate way to deal with these applications is to schedule them all for hearing, in order to entertain the parties' representations upon their disposition, either along the lines suggested in the parties' written submissions, or in such other manner as may appear appropriate. Accordingly, the Registrar is hereby directed to schedule the applications bearing Board File Nos.: 1222-84-R, 1267-84-R, 1268-84-R, 1366-84-R, and 1386-84-R for further hearing to consider all outstanding issues, in light of this decision.

9. This panel of the Board is not seized.

2442-85-U Tony Medeiros and Joe DaCosta, Complainants, v. Canadian Union of Public Employees and its Local 1479, Respondents, v. Frontenac-Lennox & Addington County Roman Catholic Separate School Board, Intervener

Duty of Fair Representation - Unfair Labour Practice - Complainants discharged from maintenance staff of school board following criminal conviction - Union refusing to proceed to arbitration - Union failure to advise complainants of five day time limit for filing grievances not a breach of duty

BEFORE: *R. Herman*, Vice-Chairman.

APPEARANCES: *Douglas F. Caldwell* and *William Moore* for the complainants; *W. J. Hayter*, *R. J. Doyle* and *C. C. Jefferies* for the Intervener; *John Elder*, *Ed Scott* and *Frank Murphy* for the respondents.

DECISION OF THE BOARD; October 28, 1986

1. Joe DaCosta and Tony Medeiros were convicted in criminal court of possession of an illegal substance, marijuana, which they admitted having stored in a school where one of them worked and were then discharged by the intervener School Board. Although a union official was present when an official of the School Board read to the complainants their respective discharge letters, neither that official nor any other member or officer of the union advised the complainants that the collective agreement required any grievance to be filed within five days. Each of the grievances subsequently filed on behalf of the complainants were filed beyond the five day period so stipulated. The complainants each allege that the respondent trade union failed in its duty of fair representation pursuant to section 68 of the *Labour Relations Act* in two respects: first, by failing to advise the complainants of the five day time limit for filing grievances pursuant to the collective

agreement, and second, by the ultimate decision taken by the union Executive that their grievances not proceed to arbitration.

2. When the circumstances relevant to this complaint first arose, Joe DaCosta had been employed by the School Board for less than three months, and was still a probationary employee, and the complainant Tony Medeiros, had been a part-time employee of the Board for several years. The complainants worked at different schools as maintenance staff. On February 25, 1985, the police were called to attend at St. Michael's School, where a fellow worker had discovered a sports bag containing what appeared to be marijuana. Upon investigation, the police discovered within that bag a total 338 grams of marijuana and an identification card belonging to Tony Medeiros. St. Michael's School was at that time the school where Joe DaCosta was working. After obtaining a search warrant, the police attended at Mr. Medeiros' house, spoke to him and charged him with possession for the purposes of trafficking. Mr. Medeiros indicated that Mr. DaCosta had also been involved in the purchase and storage of the marijuana, and the police subsequently charged Mr. DaCosta with the same offence.

3. After both complainants were taken to the police station and gave written statements to the police admitting their responsibility, they contacted Mr. C. C. Jefferies, the Superintendent of Business for the School Board, and arranged to meet with him. Both complainants testified that they came away from that meeting with Mr. Jefferies assured that they would not be discharged as a result of the criminal charge and any subsequent conviction. As will be seen later, counsel placed a heavy reliance upon the assurances Mr. Jefferies gave the complainants, and upon the union's failure to adequately consider the effect of such assurances. However, the entirety of the evidence given by the complainants themselves supports the conclusion that they were not in fact assured that they would not be discharged; rather they hopefully assumed so. As Mr. DaCosta himself testified, "We wanted assurances that nothing would happen with respect to our jobs. We were pretty sure we might get a jail term. He [Mr Jefferies] told us, he didn't assure us, but he told us that he was pretty sure the Board would not punish us a second time. We felt, when we left, hopefully that we would not lose our jobs." Whatever expectations the complainants might have had consequent upon that interview, I find that they were not promised that their jobs would be protected.

4. The complainants were not completely honest with Mr. Jefferies, as they did not advise him that the marijuana had been purchased, at least in part, for the purposes of resale to friends or the public, notwithstanding that both complainants had given written statements to the police indicating that such was the case. When originally purchased the marijuana had been intended for sale, but its quality was so inferior that the complainants considered it essentially unusable. Because of these quality limitations, the complainants had stored the marijuana in the basement of St. Michael's, for approximately two months, until the bag was discovered and the police called in. At the time, that school was not used by students, but only as a centre for teacher training.

5. After the charges were laid and the interview held with Mr. Jefferies, the complainants continued to work according to their regular schedules, and towards the end of March, 1985, they attended at criminal court where the Crown accepted a guilty plea to the lesser and included charge of simple possession. Each complainant was found guilty and received a \$150.00 fine. In response to phone calls from Mr. Jefferies, the complainants both attended at his office around 7:00 p.m. on April 3, 1985. When Mr. DaCosta was called into the office, Mr. Jefferies was there along with Mr. DaCosta's foreman and Mr. Frank Murphy, the vice-president of the union who had been invited to the meeting by Mr. Jefferies. It is common ground that to this point the union was unaware of the events, as neither complainant had in any way approached the union about their employment problem, nor had the union in any other way been advised of any of the circumstances. The meeting on April 3, 1985 was the first occasion on which the union was made aware of

the employment problems being experienced by the complainants. At that meeting, a termination letter was read to Mr. DaCosta by Mr. Jefferies, whereupon Mr. DaCosta left the meeting without discussing the letter or its contents, in order to have an opportunity to "get his thoughts together". Mr. DaCosta left the building and went home without returning to Mr. Jefferies' office. When Mr. Medeiros met with Mr. Jefferies the same scenario unfolded. The union vice-president was also present during that meeting, the termination letter was read to Mr. Medeiros, and Mr. Medeiros left the meeting without any conversation taking place between any of the participants. Both meetings or interviews consisted entirely of the termination letters being read to the two complainants and, without further conversation, the complainants leaving the office.

6. Coincidentally, that same evening a union meeting was being held, in order to deal with the ratification of the proposed collective agreement. Both complainants were aware of that meeting, but neither attended. Mr. Ed Scott, the full time CUPE representative for this Local, was at the ratification meeting, waiting to begin the meeting, when he was approached by Mr. Murphy and given copies of the termination letters which the complainants had just received. Neither Mr. Scott, Mr. Murphy, nor any other officer of the union took any steps to contact either complainant after the meetings in Mr. Jefferies' office of April 3rd. Nor did the complainants take any steps to contact the union to request assistance.

7. Approximately three weeks later, Mr. DaCosta was put in touch with his current counsel, Mr. Caldwell, and he testified that for the first time he learned that he could file a grievance. Shortly thereafter, Mr. Caldwell phoned Mr. Scott to request that grievances be filed on behalf of both complainants. Although the time limits under the collective agreement were discussed, Mr. Scott indicated to Mr. Caldwell that the time limits should not pose any problem, as arbitrators had a discretion pursuant to the *Labour Relations Act* to waive such time limits and in the circumstances as Mr. Scott then understood them, the time limits ought not to pose any problem. Under the collective agreement, the individual employee must file a grievance, rather than the union, and steps were taken shortly thereafter to have the grievances typed, signed, and presented by the individual complainants to the School Board. Both complainants met with Mr. Scott in order to give their version of the events in question, and those interviews were taped and transcribed. Each complainant also provided handwritten statements to Mr. Scott setting out his position and version of the facts.

8. After the grievances were rejected, a meeting was held between Mr. R.J. Doyle, Director of Education for the School Board, and the complainants, Mr. Scott and the Executive members of the union. At that meeting, Mr. Scott presented the case for the complainants and attempted to have the School Board rescind the terminations. Although unsuccessful in this respect, both complainants were and remain satisfied with Mr. Scott's performance at that meeting.

9. A meeting of the union Executive was set up for May 27, 1985, in order to decide whether the grievances ought to be processed through to arbitration. Four members of the Executive attended that meeting, along with the complainants and Mr. Caldwell, their counsel. Counsel was given full and complete opportunity to make any submissions and present any evidence he wished at that meeting. The Executive thereupon discussed the grievance, and attempted to assess the merits and likely chance of success, taking into account the relevant circumstances and the submissions of counsel. They concluded that the grievances stood virtually no chance at arbitration. They based this in part on research on arbitral jurisprudence that Mr. Scott had conducted, on the fact that the School Board acknowledged the excellent work records of the complainants, the relatively short seniority of both complainants, and in particular the fact that the marijuana had been stored in the work place in one of the schools. They also considered the union's relations with the

employer and what effect taking these grievances to arbitration might have upon such relationship and in turn upon the other employees in the bargaining unit. Part of such concern was based upon the serious nature of the offence in question, how negatively the employer School Board would perceive such an offence, and how the union's bargaining relationship with the employer might be adversely affected by taking such grievances to arbitration. They considered the historical interaction with the Board, and the particular stances and approach the School Board had taken with the union in its prior interactions. The Executive felt that they were at last making some progress in convincing the School Board that the union was a responsible bargaining agent, and the Executive was loath to jeopardize this progress. The Executive was also concerned that the nature of the employment offence, storing marijuana bought for the purpose of trafficking, in one of the Board's own schools, would be perceived quite negatively both within the community at large and by the School Board. The Executive was quite candidly concerned about the deleterious effect on their bargaining relationship of taking these grievances to arbitration, particularly given their assessment that the grievances had very little chance of success. The Executive voted unanimously not to proceed to arbitration with the grievances and the complainants were so advised.

10. The Executive provided, uncharacteristically, an opportunity to appeal the decision not to proceed to arbitration, and a special meeting of the Executive was held on June 5, 1985 to this end. Mr. Scott and three members of the Executive attended on behalf of the union, and complainants' counsel attended along with Mr. DaCosta. Mr. Medeiros was working at the time at a new job, and was unable to attend. At that special meeting, counsel was again given full and complete opportunity to discuss the facts or evidence and to make submissions. Counsel handed to the Executive various letters of reference with respect to the two complainants, and offered on behalf of the complainants that they would pay all financial costs of taking the matter to arbitration. The Executive confirmed their earlier decision that these grievances not be taken to arbitration, advising counsel and Mr. DaCosta that they based their decision on three factors: the seriousness of the offenses and particularly that the offenses involved the storage of illegal drugs on school property during school hours; the assessment of the Executive that there was little or no chance of winning at arbitration; and the potential negative effect on the bargaining relationship with the School Board.

11. A few additional facts merit consideration. Mr. DaCosta testified that he did have a copy of the applicable collective agreement, and had only started to read it when the events in question occurred. There was no suggestion that Mr. Medeiros did not similarly have a copy of the collective agreement. Mr. DaCosta also testified that towards the end of February, 1985, around the time the stored marijuana was discovered and the complainants charged, Mr. DaCosta's supervisor gave him the names of two union stewards and told Mr. DaCosta that should he have any problems with respect to employment he ought to contact them. Despite having the collective agreement, having begun to read it, and having been specifically advised by his supervisor that the union could assist him if he had any problems, Mr. DaCosta did not contact the union prior to the termination meeting of April 3, 1985, nor did he say anything to Mr. Murphy during that meeting, nor did he contact the union after that meeting in order to request its assistance. The first approach by either complainant to the union was through their counsel when counsel phoned Mr. Scott to request that grievances be filed.

12. Based on these facts, the complainants allege that the union violated the duty owed them under section 68 of the Act, when it failed to advise them, either at the termination meeting of April 3, 1985 or shortly thereafter, of the five day time limit in the collective agreement for filing grievances, and indeed of the rights of the complainants to file grievances at all. The complainants allege a further violation in the union decision not to take their grievances to arbitration. Counsel alleges the union violated their duty in not investigating or considering relevant information, spe-

cifically the letters of reference provided by counsel to the Executive and the argument of estoppel, which argument arose, in counsel's submission, from Mr. Jefferies' "assurances" that the complainants' jobs would not be in jeopardy. Counsel further alleges that the union acted in an arbitrary manner when it considered the merits of taking these matters to arbitration and, in balancing the interests as it did, the union reached a wrong conclusion on the merits. Finally, though not specifically pleaded nor articulated during submissions, counsel appears to be suggesting an element of bad faith on the part of the union, as in considering the effect on the bargaining relationship with the employer the union was more concerned with its own reputation than with being fair to the complainants and properly assessing the merits of their positions.

13. I propose to deal firstly with the allegation that the union breached the Act by their decision not to proceed to arbitration. In that regard it may be useful to refer to a passage from one of the cases referred to by counsel for the complainant, *North York General Hospital* [1984] OLRB Rep. Feb. 286:

14. The grievance and arbitration process is an essential component of a regime of collective bargaining. An employee who is fired, refused a promotion or otherwise dealt with by management in contravention of a collective agreement relies upon this legal mechanism for redress. Section 44(1) of the Labour Relations Act requires that every collective agreement provide for the arbitration of all contract disputes - or for their resolution by some other peaceful means. But direct access to an arbitrator is not statutorily guaranteed to an individual employee. Instead, the legislature has granted a trade union, the exclusive bargaining agent for all employees, the right to compel the employer to submit a grievance to arbitration. The union's exclusive authority is counterbalanced by its duty to fairly represent each employee. The duty of fair representation is found in section 68 of the Act:

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

15. The double barrelled prohibition against discrimination and bad faith is calculated to prevent differential treatment on the basis of such criteria as race, creed, colour, sex and to preclude invidious conduct motivated by trade union politics, personal animosity and favouritism. See *Prinesdomu*, [1975] OLRB Rep. May 444 at para. 24; [1975] 2 Can. LRB 310, at 315. This aspect of the duty of fair representation is important, but once the pertinent facts are proven, cases of this variety are easily decided. Giving meaning to the work arbitrary is a far more vexing task that must begin with an appreciation of the role played by union officials in contract administration.

16. In representing grievors, the officials of a union are called upon to perform two very different sorts of tasks; they investigate employee claims and act as advocates in the grievance process; and they also decide what grievances are to be abandoned, settled, carried to the next stage in the grievance process, or arbitrated. A fair representation complainant typically alleges that an official who acted as investigator or advocate did not exercise proper care or that a decision as to the disposition of a grievance was inappropriate. Although both counts are not infrequently combined in a single complaint, these distinct lines of attack throw up issues of labour law policy that are as different as the two categories of functions carried out by union officials.

17. A disgruntled grievor may challenge only the propriety of the union's decision not to pursue a grievance, and not dispute the union's investigation or advocacy. In this setting, labour relations boards have started from the basic premise that the pursuit of a grievor's claim may adversely affect other employees, and that a bargaining agent is best suited to choose between the competing interests of its constituents. As this Board said in *Ford Motor Company of Canada*, [1973] OLRB Rep. Oct. 519 at para. 38, a union is under "a duty to act fairly in the interests of all members, minority factions, as well as majority factions, individual employees as well as the collective group".

18. In that decision, the Board identified three collective concerns upon which an individual employee's contract claim may impinge. The resolution of many grievances calls for the reconciliation of conflicting job interests. When two person vie for a single job in the context of a promotion or layoff, a grievor's gain is someone else's immediate loss. More often, the disposition of a grievance will have a prospective effect upon members of the bargaining unit. An arbitration award (or even a settlement) will shape future arbitral decisions (and accommodations) to the detriment of some workers and to the benefit of others. As Professor Cox has demonstrated in "*Rights under a Collective Agreement*" (1956), 69 Harv. L.R.601, conflict among employees is not limited to matters of layoffs and promotions. On the other hand, some grievances - for example, most discharge cases - pose no threat to the jobs of a grievor's fellow workers. See *Ford Motor Company of Canada*, supra, at para. 38, 41 and 42.

19. The second group interest is in the smooth functioning of the grievance process. A well-oiled settlement mechanism is essential to a healthy collective bargaining relationship for two reasons. An agreement crafted by the parties is inherently more sensitive to their needs than is an award fashioned by a third party, who necessarily knows less than they do about the situation and their priorities and is constrained by existing contractual rights. Another advantage of informal settlements is the speed with which they can be fashioned as compared with the time necessary to adjudicate a dispute. These virtues of private accommodation can only be realized if a union does not press undeserving grievances and management responds with an equally cooperative attitude to meritorious claims. See *Ford Motor Company of Canada*, supra, at para. 42, 43 and 45.

20. Finally, the carriage of an employee claim through the grievance process to arbitration also consumes collective resources. Labour-management meetings occupy the time of paid representatives and distract volunteers from other activities. Arbitrators command large fees and the services of lawyers, who frequently appear as counsel at hearings, are expensive. These costs are borne not by a grievor, but by a trade union, or, more accurately, union members. See *Ford Motor Company of Canada*, supra, at para. 42.

21. In deciding the fate of a grievance, a union official must weigh these group concerns against the interests of the grievor. The force of a grievor's claim will vary greatly from one case to another. The benefit sought by a grievor may range from a few hours' pay in compensation for a missed overtime assignment to continued employment. An employee who is terminated is deprived of not only wages, but pension contributions, welfare benefits, and seniority rights, and severance will often cause emotional trauma and social upheaval as well. the force of an individual's assertion of a contractual right also depends upon the degree of support which a grievance finds in both the facts and contractual language which may be highly specific, but frequently is as open-textured as a clause permitting discharge only for just cause. The greater the merit of a grievance, the higher is the probability that it could be won and that an employee is prejudiced if it is dropped. Moreover, contractual rights may give rise to a reasonable expectation of a contractual advantage and expectation often leads to detrimental reliance. For example, a person who is in line for a merit increase may decline an offer of other employment. Finally, the past practice of a union may add weight to an employee's claim to enforce a collective agreement. A union which has previously arbitrated all disputes of a certain type - for example, discharge cases - but subsequently abandons such as grievances, violates the notion of equal treatment. Past practice which is known to an employee generates an expectation of continuity. See generally *Rayonier Canada (B.C.) Ltd.*, [1975] 2 Can. LRBR 196 (B.C.) at 204; *Prinesdomu*, supra, at para. 27; and *Barber Coleman of Canada Ltd.*, [1976] OLRB Rep. Oct. 13, at para. 17; [1977] 1 Can. LRBR 182, at 187.

22. These are the conflicting individual and collective interests that arise when a decision is made whether or not to press a grievance. To avoid being arbitrary, a union official must consider the relevant factors and engage in a "rational" process of decision-making: see *Prinesdomu*, supra, at para. 25. Such an approach to labour board review entails a high degree of deference to bargaining agents. Legal restraint is amply justified because a trade union is better able than a labour relations board to reconcile competing job interests, to ration the limited capital of the grievance settlement process, and to allocate group funds. These are essentially political tasks not amenable to legal regulation. In the words of Archibald Cox:

When the interests of several groups conflict, or future needs run contrary to present

desires, or when the individual's claim endangers group interests, the union's function is to resolve the competition by reaching in accommodation of striking a balance. The process is political. It involved a melange of power, numerical strength, mutual aid, reason, prejudice, and emotion. Limits must be placed on the authority of the group, but within the zone of fairness and rationality this method of self-government probably works better than the edicts of any outside tribunal. (*Law and the National Labour Policy*, (1960), at 83 to 84.)

14. With respect to this aspect of the complaint, I conclude that the Union did not violate section 68 and in no respect acted in a manner that was arbitrary, discriminatory, or in bad faith in reaching the decision not to process the two grievances through to arbitration. To the contrary, I conclude that the union fairly represented both complainants in reaching the decision not to arbitrate. Although the union was aware of the discharges at the termination meeting of April 3, 1985, it was not until phoned by complainants' counsel that the union was made aware that the complainants were challenging, or seeking to challenge such discharges. At that point, the union took immediate action to investigate fully all the circumstances surrounding the discharges. They called the two complainants to come in and explain their version of the circumstances, they took immediate steps to have grievances filed, and they processed those grievances through the steps of the grievance procedure. At the appropriate step, Mr. Scott on behalf of the union presented the case for the complainants, and it is common ground that he fully and adequately represented the complainants at that step of the grievance procedure. When the grievances proved, as expected, unsuccessful through the steps of the grievance procedure, the Executive convened a meeting to consider whether the grievances should be taken to arbitration. At that meeting, the complainants attended with counsel and counsel was given full and ample opportunity to present their case.

15. Provided the union does not act in an arbitrary, discriminatory, or bad faith manner in reaching its decision not to arbitrate, it is open for the union to be wrong as to its assessment of the merits of proceeding to arbitration. It is not for this Board to decide whether the union arrived at the correct decision in deciding not to arbitrate. In my view the union properly considered all the relevant factors, including researching the applicable jurisprudence and law, considering all the circumstances of the offences, and in considering the stories of the complainants, and counsel's submissions, including letters of reference submitted in their support. The three factors or reasons given by the union for deciding not to arbitrate, the seriousness of the charges involved, the slight chance of success at arbitration, and the effect of arbitrating on the overall bargaining relationship with the employer, are all in my view proper factors to consider in reaching a decision. The evidence clearly establishes that the union fairly and sensitively considered all these factors and it cannot be maintained that they acted in an arbitrary or bad faith fashion in considering such factors or in reaching the decision which they did. The offence to which the complainants pleaded guilty, possession of an illegal substance, was a particularly serious offense given that the substance had been stored on school property. Notwithstanding the guilty pleas and the conviction for simple possession, the union was also aware that the marijuana had been bought for purposes of resale and that this would likely come out during any arbitration. Of further significance was the fact that this particular employer was a School Board, and understandably viewed very seriously drug offences within the work place. Reasonable as well was the union assessment that the community at large would also view quite seriously such an offence. Although counsel for the complainants pointed to various factors in supporting his submission that on the merits the grievances would have been successful (the Board ventures no opinion on this), quite apart from whether the grievances would have been successful at arbitration or not, it is clear that the union considered all the submissions and arguments put to it, balanced the interests of the complainants along with the interests of the membership at large, and reasonably concluded that the grievances should not be taken to arbitration. In reaching these decisions, the union did not give any weight whatsoever to the fact that the grievances were filed in an untimely manner. The factors they considered, independent of the

timeliness problem, led them to conclude that the grievances should not be taken to arbitration. Recognizing the serious effect of discharges, the union afforded a further opportunity to the complainants and their counsel to convince the union that the two grievances ought to be arbitrated. Again, counsel for the complainants was given full opportunity, and the union again considered all relevant factors. Neither the decision not to arbitrate these grievances nor the process undergone in reaching this decision violates section 68 of the Act and the complaint with respect to this ground is hereby dismissed.

16. The second ground raised by the complainants is that the union violated its duty in neglecting to advise the complainants both of their rights to file grievances and that any such grievances must be filed within five days as set out in the collective agreement. This allegation is potentially relevant in two respects. First, if the union did violate section 68 in neglecting to so inform the complainants, and subsequently relied upon the untimeliness of the grievances in reaching the decision not to take the matters to arbitration, it could reasonably be maintained that this union breach of section 68 in some way "tainted" the decision not to take the matter to arbitration. The union would have relied on a factor which existed because of its own violation of the Act. However, as noted above, the union in no way placed any weight upon the untimeliness of the grievances in reaching the decision not to send the grievances to arbitration. Even if the union did therefore violate section 68 in its failure to properly advise the complainants as alleged, any such failure would not lead to a conclusion it had violated section 68 in its consideration of whether to take the matters to arbitration. That is, any breach arising out of any failure to advise the complainants would effectively have been nullified by the decision, properly taken in all respects, not to take the matters to arbitration.

17. But the failure to advise the complainants of their right to grieve and the five day time limit for so doing is relevant in another respect. The evidence before the Board shows that the School Board, in denying the grievances during the steps of the grievance procedure, relied at least in part on the fact that the grievances were untimely. While the eventual union decision not to take these matters to arbitration did not violate section 68 of the Act, it cannot be said that the employer would necessarily have taken the same stance throughout the grievance procedure had the grievances been filed in a timely fashion. Put differently, it was theoretically possible that the School Board would have agreed to revoke the discharges during the steps of the grievance procedure, had the grievances been filed in a timely fashion. Thus, if the union did violate section 68 in not indicating to the complainants the requirement that the grievances be filed within five days, the complainants argue that such failure and the resultant untimely grievances harmed them by reducing the chances that the employer School Board would reconsider the discharges. For this reason, it is necessary to consider whether the union did in fact breach section 68 by its conduct in remaining silent during the termination meeting, and by not seeking out and advising the complainants subsequent to that meeting, that they had both the right to file grievances and if so must file them within five days.

18. Counsel for the complainant referred the Board to a number of cases in support of this proposition (*J.M. Schneider Inc.*, [1984] OLRB Rep. Mar. 467, *North York General Hospital*, [1982] OLRB Rep. Aug. 1190, *North York General Hospital*, [1984] OLRB Rep. Feb. 286) and characterized the issue as one of whether the union owed a duty to the complainants to inform them of their rights under the collective agreement. While of some assistance, none of the cases cited were directly on point to this issue. In the Board's view, the issue is not properly characterized as whether the union owes a duty to potential complainants to inform them of their rights under the collective agreement. Rather, the correct characterization is whether in the circumstances before the Board, the union breached section 68 by not advising the complainants of their rights to grieve and the requirement that they do so within five days. It is not a question of whether

there was an affirmative duty placed upon the union to so advise the complainants, but whether failure to do so amounted to a violation of section 68 of the Act.

19. Although the Board only received direct evidence that Mr. DaCosta had a copy of the collective agreement, had begun to read it, and had been specifically advised that he should contact the union stewards, whose names he was given should any employment problems arise, given the constant interaction between the two complainants throughout the events in question, it can only be inferred that Mr. Medeiros similarly had a collective agreement and must have been aware that the union could be and ought to be approached should he have any employment problems. Notwithstanding these factors, neither complainant approached the union for assistance. The Board can only assume that at the relevant time the complainants did not require nor want the assistance of the union. Such an inference is consistent with the complainants' evidence that they felt assured after their meeting with Mr. Jefferies that their jobs would not be in jeopardy. At the termination meeting on April 3, 1985, neither complainant requested any assistance from the union. Again, the Board notes that the complainants were both aware that a union meeting was being held the same evening as their termination meetings, yet neither complainant attended at that meeting.

20. In my view the respondent union did not violate section 68 in not advising the complainants of their right to file grievances and the timeliness requirements in that respect. The complainants must have known that their jobs were in jeopardy, or at the very least, that some employment consequences might result from their activities; otherwise they would not have contacted Mr. Jefferies in late February, 1985 and sought his "assurances". Yet they did not contact the union throughout the relevant period nor evidence any desire that the union assist them. Similarly, distinguishing these facts from the applicable cited cases, the union in no way misrepresented or misinformed the complainants as to their rights under the collective agreement when asked about those rights. The union learned at the termination meetings on April 3rd that almost 1 1/2 months earlier the complainants had been charged with a criminal offence, but had not approached the union for help. During that meeting, when the termination letters were read to the complainants, neither complainant said anything to the union representative nor in any way requested the union to help. Even after the meeting, union assistance was not requested. The union reasonably assumed that neither complainant wanted the union to help them. The union therefore remained silent while awaiting some indication from the complainants that the complainants wanted the union to assist them. To hold that a union violates section 68 by awaiting some indication from potential grievors that they wish to complain about their treatment at the hands of the employer, would be to place an unreasonable burden upon a union. When a union learns that an employee has suffered employment consequences, but has not sought its help, though there has been ample opportunity to do so, it cannot be said that the union acts arbitrarily, or in bad faith, by declining to actively seek out that employee to advise them of their rights. If, as counsel for the complainants suggested, the union had a positive duty to seek out and advise the potential grievors of their rights under the collective agreement given that the union was then aware of the discharges, unions would be routinely and constantly required to approach employees and explain to them all their rights and obligations under the collective agreement. A union would be required to meet, individually or collectively, with all such employees and not only recite each clause of the collective agreement, but explain to the satisfaction of all employees what such clauses meant. It simply cannot be sustained that a failure to do so amounts to arbitrary or bad faith conduct within the meaning of section 68 of the Act. If any positive duty does exist, it is the duty of employees who want union assistance to so request it.

21. For these reasons, the Board dismisses the remaining aspect of the complaint in so far

that it alleges a violation of section 68 in the failure of the union to advise the complainants of their rights.

22. At the conclusion of the hearing, after reserving on its decision, a request was made of the Board that the matter be reopened for further submissions with respect to this second issue; that is, whether the union breached section 68 in not seeking out and advising the complainants of their rights. This request was opposed by the complainants, and the Board reserved on this issue as well. As the hearing has been completed, and in light of the opposition of the complainants, the Board declines to so reopen the hearing.

0681-86-R Teamsters Local Union No. 230, Ready Mix Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers, Applicant, v. Millwork & Building Supplies Limited, R & R Insulators Limited, Respondents

Related Employer - Sale of a Business - Shifting of insulation bat business from unionized Millwork to non-unionized R & R - Transfer of work indicating related employers but not sale of a business - Board deciding not to exercise discretion to make a declaration that R & R bound by collective agreement between Millwork and union

BEFORE: *Patricia Hughes*, Vice-Chairman, and Board Members *F. C. Burnet* and *C. A. Ballentine*.

APPEARANCES: *David A. McKee*, *Ron Burns* and *John Van Heuvel* for the applicant; *Derek L. Rogers*, *Simon C. Armstrong*, *Rob Lupton* and *Roger Shingler* for the respondents.

DECISION OF THE BOARD; November 20, 1986

1. In this application, the applicant union ("the union" or "Teamsters Local 230") applies under section 63 of the *Labour Relations Act* ("the Act") for a declaration that there has been a sale of a business by Millwork & Building Supplies Limited ("Millwork") to R & R Insulators Limited ("R & R") and that the collective agreement between the union and Millwork applies to R & R. The union also applies for a declaration under section 1(4) of the Act that Millwork and R & R are related employers and that R & R is bound to the collective agreement between Millwork and Teamsters Local 230.

2. Millwork is a building material supplies company which sells and delivers various types of building materials to job sites, including insulation bats. It has been in operation since 1951. R & R has been in operation for three years, during which time it for the most part has installed blown insulation in residential construction. In May of 1986, the extent to which Millwork supplied insulation bats was reduced. During the first quarter of 1986, the insulation bat business constituted 13-1/2% of gross sales at the Ajax Millwork location; by July that figure had been reduced to 3 per cent. R & R began to supply insulation bats. Neither company installs bat insulation, but both companies now sell and deliver it. R & R gets insulation bats directly from the manufacturer, but the sale is to Millwork which invoices R & R. Millwork is not involved in the blown insulation business, but R & R sells, delivers and installs blown insulation. Millwork has two locations, one in Ajax (also called the Pickering location) and one in Oshawa. In Oshawa it has a large retail store and building home centre and in Ajax a warehouse and retail operation. R & R is located in Pick-

ering. A certificate from the Ministry of Transportation & Communication indicates that R & R's mailing address is in Oshawa and that its corporate head office is in Oshawa at the same location as the Millwork Oshawa store. Furthermore, the R & R location is one mile down the road from the Ajax/Pickering location of Millwork. R & R has a telephone number under its own name and has its own invoice and delivery documents and similar materials. There is no interchange of employees between R & R and Millwork.

3. Millwork is family held. Nine of 15 shares are held by Edward Lupton, the founder of Millwork and the father of Robert Lupton, the President of Millwork, who owns one share. Sandy Lupton and Gail Lupton, sisters of Robert Lupton, each owns one share. Robert Lupton's mother, Isabel, owns one share. The remaining two shares are in trust for two younger children, Susan and John. Sandy Lupton is the accountant and Gail Lupton is the credit manager of Millwork, neither of them performs any function for R & R. Roger Shingler is the general manager of Millwork. Both he and Robert Lupton have offices at Oshawa. Twenty-five per cent of the R & R shares are held by Robert Lupton and twenty-five per cent are held by Roger Shingler. The remaining shares are distributed among Sandy Lupton, Gail Lupton and Isabel Lupton. Robert Lupton is the President of R & R and Roger Shingler is the Secretary. The manager of R & R is Bob Mason who previously worked at an unrelated company and now reports to Shingler. Shingler's wife, Maryanne, looks after the books at R & R. The companies have a common auditor.

4. The union was certified at Millwork in 1968. The bargaining unit at Millwork in Oshawa has ranged from 21 employees in March of 1986 to 26 today (there were 23 in May and 24 in July) and has been reduced from 6 at the Ajax location in March 1986 to 3 today. There is no union at R & R.

5. In late July or early August, 1986, it was decided by Robert Lupton and Shingler that it would be more efficient if Millwork's deliveries were made by having Millwork trucks operate from the Oshawa location, instead of running deliveries from both Oshawa and Ajax. The Ajax trucks were therefore moved to Oshawa. Prior to May 1986, there were six employees at Ajax with two drivers driving out on a steady basis, according to Robert Lupton, the President and Director of both Millwork and R & R. He stated that those drivers could be involved in delivering bats "one, two or three or no hours in a day". There are now three employees at Ajax receiving materials and making up delivery loads to be picked up by the trucks coming out of Oshawa. Lupton explained that the trucks were moved from Ajax to Oshawa because the stock at Oshawa is wider and more complete and therefore the move allows for a more efficient delivery system. Two employees affected by the move were offered continued employment at Oshawa and one of them accepted the offer and the other one went to another job.

6. Shingler explained that through its Ajax location, Millwork was serving a number of accounts, four of which were more significant than the others. These accounts required and demanded that the bats be on construction sites by 7 a.m. There was a fear that business would be lost because Millwork would not be able to provide the bats when required. It should be noted that R & R was able to obtain the business with the contractors it supplies because of Shingler's contact with Millwork. He went to some of the contractors who deal with Millwork in the drywall business and persuaded them to contract with R & R for delivery of the insulation bats. Lupton explained that blown insulation does not have to be installed at a particular time and therefore employees at R & R could deliver bats in the early morning and then the blown insulation, while at Millwork carpenters also wanted frames delivered by 7 a.m., the same time at which the contractors wanted the bat insulation delivered; Millwork could not handle both requirements. Since May 1986, the employees at R & R have been delivering insulation bats to meet the contractors requirements and then going on to deliver blown insulation. The R & R employees use the same trucks for bat and

blown insulation. Lupton stated that no equipment had been transferred and that R & R was using the trucks they were using before, as well as existing equipment. The only change with the move was that R & R purchased or leased a fork lift truck. No employees from Millwork have worked at R & R in the delivery of insulation bats. Lupton testified that there was no intention to move any other stock or inventory from Millwork to R & R.

7. Shingler indicated that R & R's trucks could service a greater number of houses than could the trucks at Millwork and that this was a factor, along with the time, in deciding to switch the bat business to R & R from Millwork. Although Lupton agreed on cross-examination that there was no reason that the shifts at Ajax could not have been changed to accommodate the requirement that the bats be delivered by 7 a.m., Shingler stated that if the hours in Ajax were changed to accommodate the requirement of early delivery of bats, that other deliveries would not be done. There was also difficulty with space with respect to loading the trucks the night before to be ready for morning delivery and being kept in the warehouse to keep them out of the rain, since they would have to be driven by part-time employees. Inventory was thus transferred from Millwork to R & R. Shingler explained that by saying that he had had a meeting with the yardman at Millwork and asked him the amount of insulation he needed to operate there, and the excess then went to R & R. He testified that half of the volume of Millwork went to R & R and the space at Millwork was used to store other materials. Lupton agreed that it was possible that the entire bat stock at Millwork was removed to R & R in May of 1986, although he indicated that it was intended that only some of the stock be removed. Shingler also admitted that if bats were delivered out of Millwork, the employees would have to be paid overtime. It is not necessary to pay employees at R & R overtime, as would be the case at Millwork; however, employees at R & R work on a piecework basis and Lupton estimated that the total annual cost for R & R is higher than for Millwork in that earnings are higher. He agreed that it was easier to calculate the earnings of R & R employees than Millwork employees if the Millwork employees had to be paid overtime. Shingler said that they had to compete financially with other insulators. He explained that the reason that R & R buys bats from Millwork (at a percentage of cost) is that Millwork buys over one million dollars of insulation and uses that buying power to get the cheapest price. The cost to R & R of the bats is less than the cost to contractors because the contractor will only buy 20 bags while R & R buys trailer loads. Shingler testified that it would be much more difficult to do the volume of bats delivery out of Ajax as is done through R & R because it would be necessary to build new warehouses and buy trucks; similarly, changes would have to be made to the warehousing at Oshawa and trucks bought.

8. The union's witness, John Van Heuvel, who has worked at the Ajax yard of Millwork since May, 1984, testified that he had never heard complaints about part-time employees driving the truck into the warehouse for the night. He also testified that R & R moved into buildings directly in front of the Ajax Millwork yard one or one and a half years ago and there built a shelter to store blowing insulation. He also stated he had carried dry wall from Millwork across to R & R to help build the office, but later agreed on cross-examination that that had been for a structure not belonging to R & R. R & R moved from that location, according to Van Heuvel a week before this application was filed and at that time the employees had a meeting to see if something could be done about that. R & R had taken all the bat insulation from the Ajax warehouse and had left only a few broken bags. Subsequently, bats were stored at Millwork again and now Millwork is served by R & R. He testified that usually storage was not a problem because Millwork does not purchase a large quantity of insulation at a time. He indicated in cross-examination that he had heard that the union had tried to organize the R & R workers but he did not know whether they had been successful.

9. Under section 63 of the Act, an employer who purchases a business from an employer

who is bound by a collective agreement with a trade union is also bound by that agreement until the Board declares otherwise. Under section 63(1)(b), “sells” “includes leases, transfers and any other manner of disposition, and ‘sold’ and ‘sale’ have corresponding meanings”. The transfer of work is not a condition attracting the operation of section 63: *The Charming Hostess Inc.*, [1982] OLRB Rep. April 536; *Ottawa Truck Centre*, [1982] OLRB Rep. Nov. 1704, [1983] OLRB Rep. Jan. 139. In *British American Banknote*, [1979] OLRB Rep. Feb. 72, the Board stated that section 63 “cannot be interpreted as guaranteeing to a bargaining agent an absolute right or property in the work performed by its members. Section [63] serves only to preserve bargaining rights that have become attached to a business entity so that when that business entity is transferred, either in whole or in part, those bargaining rights survive and bind the successful employer”. We find no evidence to support the allegation that there was a sale of the business from Millwork to R & R.

10. Section 1(4) of the Act reads as follows:

Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

11. The Board set out the criteria for determining whether or not businesses are under common control or direction in *Walters Lithographic Company Limited*, [1971] OLRB Rep. July 406:

The indicia or criteria which the Board considers relevant in making a determination as to whether the activities or businesses of one or more corporations, individuals, firms, syndicates or associations, or any combinations thereof are carried on under the common direction and control and therefore may be treated as one employer are -- (1) common ownership or financial control, (2) common management, (3) interrelationship of operations, (4) representation to the public as a single integrated enterprise, and (5) centralized control of labour relations. No single criterion is likely to decide the issue.

On the evidence set out above, we find there are substantially common ownership and financial control, common management and centralized control of labour relations. There is some interrelationship of operations (for example, through the sale of bats to Millwork which are invoiced to R & R.)

12. In *Bright Veal Meat Packers Ltd.*, [1981] OLRB Rep. Mar. 247, the Board concluded that two companies were related within the meaning of section 1(4) of the Act because there was “a comprehensive integration of the two operations, with both regular and significant intermingling between the employees of the two groups”. There is not here a comprehensive integration of the two operations, nor regular and significant intermingling between the employees of Millwork and R & R. However, this does not end the matter, since there is an additional concern involved: the mischief which section 1(4) is designed to meet is not only a shifting around or interchange of employees between unionized and non-unionized work forces, but also the shifting of work from a certified to an uncertified business. A shifting of work may not constitute a sale of a business, but it does mean that an employer may have scope to have his business carried out by non-unionized employees, even though a significant element of his business is in fact unionized. As the Board said in *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945, at paragraph 12:

Section 1(4) was enacted in 1971 and deals with situations where the economic activity giving rise to employment or collective bargaining relationships regulated by the Act, is carried out by, or through more than one legal entity. Where such legal entities carry on related business activities under common control or direction, the Board is empowered to pierce the corporate veil.

Section 1(4) ensures that the institutional rights of a trade union, and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried on. Legal form is not permitted to dictate or fragment a collective bargaining structure; nor will alterations in legal form undermine established bargaining rights.

The Board pointed out in that case that it is possible to transfer business from one corporate activity to another without contravening section 63 but that, particularly in the construction industry, bidding may be done and work performed through whichever company is convenient. In paragraph 15, the Board stated

The relationship between the business entities is a functional rather than a temporal one. Businesses or activities are 'related' or 'associated' because they are of the same character, serve the same general market, employ the same mode and means of production, utilize similar employee skills, and are carried on for the benefit of related principals. If these criteria are met, two businesses may be 'related' within the meaning of section 1(4) even though their activities are carried on through different or corporate vehicles and are not carried on simultaneously.

In this case, of course, the two entities are carrying on business simultaneously.

13. On the evidence set out above, we find that Millwork and R & R are related businesses within the meaning of section 1(4) of the Act. However, this is merely the first step of the analysis. We must then decide whether or not to exercise our discretion under that section to make a declaration that the two entities are related and associated businesses and that R & R is therefore bound by the collective agreement between Millwork and the applicant union. In *The Charming Hostess Inc.*, [1982] OLRB Rep. April 536, the Board indicated that both section 1(4) and section 63 "are designed to preserve the collective bargaining status quo despite commercial transaction which alter the legal identity of the employing entity, and would consequently undermine established bargaining rights". In that case, the Board found that the businesses were not related because they were independent, "with their own established employee complement, operated for the benefit of their own principals, and providing their specialized services to a variety of purchasers of which Molson's is only one. Both businesses were in operation long before the Molson's contract, and, no doubt, they will continue thereafter. Neither is a mere shell or a device to avoid collective bargaining obligations, and neither can be regarded as an instrumentality of Molson's". Charming and Amsterdam provided host and hostesses and food services respectively, for a hospitality suite built in the brewery. However, the Board held that even if it were to find that these were related businesses, it would not exercise its discretion to issue a declaration because "[t]he purpose of section 1(4) is to preserve bargaining rights not to extend them".

14. In our view, were we to issue a declaration that Millwork and R & R are related employers and that the collective agreement between Millwork and the union were to apply to R & R, we would be extending bargaining rights, not preserving them. For this reason, we decline to issue a declaration and this application is hereby dismissed.

**2054-86-M Sheet Metal Workers International Association, Local 537, Applicant,
v. Helmut Mueller, Respondent**

**Construction Industry Grievance - Employer - Whether Board sitting as arbitrator will
apply principle of *res judicata* - Whether respondent an employee or independent contractor**

BEFORE: *G. T. Surdykowski*, Vice-Chairman, and Board Members *I. M. Stamp* and *H. Kobryn*.

APPEARANCES: *Stanley Simpson* and *Owen Pettipas* for the applicant; *Helmut Mueller* appearing on his own behalf.

DECISION OF THE BOARD; November 24, 1986

1. This referral of a grievance to the Board pursuant to the provisions of section 124 of the *Labour Relations Act* had its genesis in a previous decision of the Board, by a differently constituted panel (the "Mitchnick" panel), in *S. N. Ventilation Heating Limited*, [1986] OLRB Rep. Sept. 1309. In that decision, also a referral under section 124 of the Act, the Board said as follows:

3. The evidence now discloses that much of the work in question was performed on a "subcontract" basis by Mueller Sheet Metal, and much of it by Steve Dojcinovic, the owner of Steve's Sheet Metal, himself. With respect to the former, Mr. Dojcinovic was approached by Mr. Mueller, who has been the proprietor of a registered company called "Mueller Sheet Metal" since 1977, and was asked if he would subcontract some fabrication work to him. Mr. Dojcinovic was aware of the restrictions under the collective agreement with respect to subcontracting, the relevant provision of which provides:

ARTICLE 9 - SUB CONTRACTS

9.1 When subcontracting the employer agrees that any and all of the acknowledged work herein contained in the Clause covering Trade Jurisdiction in the respective Appendix must be subcontracted to an employer who is a signatory to this Provincial Agreement, providing such subcontractors are available.

Mr. Dojcinovic accordingly told Mr. Mueller that he would subcontract work to Mueller Sheet Metal if he were able to get a collective agreement with the applicant union.

4. Mr. Mueller consequently attended at the office of the applicant. He explained to the Union that he was setting up in business, and would like to become a Union member and sign a collective agreement. He was asked a few questions about his intentions for the business, after which the Union signed him to a collective agreement. With respect to becoming a Union member, however, the Union told him he would have to wait until he actually started up a shop, and the Union would look at the situation then. Mr. Mueller then took his collective agreement back to Mr. Dojcinovic, and Mr. Dojcinovic agreed to give him some of the fabricating work in Mr. Dojcinovic's shop. Mr. Mueller quoted an hourly rate, and was paid on that basis, without deductions (all of the normal matters subject to payroll deduction were the responsibility of Mr. Mueller). Mr. Mueller would bring his own tools in to the shop of Steve's Sheet Metal, would be handed a work order by Mr. Dojcinovic, and would be left by Mr. Dojcinovic (who was frequently out of the shop doing residential work) to complete the work.

• • •

6. The Board recognizes that it is not unusual for tradesmen to set themselves up as purported "independent contractors", and to be treated as such on the payroll by those engaging their services, under circumstances in which the Board would not necessarily find them to be "independent contractors" at all. See, e.g., *Montreal Locomotive Works*, (1947) 1 D.L.R. 161; *Babco Plumbing Services*, [1985] OLRB Rep. Dec. 1693. In the present case, however, none of us are of the view that we ought to go behind the "subcontracting" arrangement upon which Mr.

Dojcinovic claims to have relied. As much as Mr. Dojcinovic had made his dislike for the collective agreement apparent throughout his testimony, we do find that he was acting in good faith in demanding from Mr. Mueller that he obtain a collective agreement from the Union before he could receive any work from the respondent.

The Union knew that Mr. Mueller was not set up in his own shop at that point, and in fact withheld membership from him on that basis. As the Union's business agent in his testimony acknowledged in hindsight, the Union might well have held back on the signing of a collective agreement until Mr. Mueller showed signs of opening his own shop as well. We understand why the Union would be anxious to sign any potential contractor to a collective agreement as early as possible, but we also have to consider what is fair to all of the parties involved in the present inter-relationship. *If the Union is held to the "subcontract" arrangement that ensued, they still have a remedy against Mueller Sheet Metal*, who asked to be signed to the collective agreement. If the Board goes behind the "subcontract" arrangement to place all of the liability on Steve's Sheet Metal, the latter company has no recourse against anyone. And it is Mueller Sheet Metal that has in fact been paid by Steve's for the work in question. Having regard to the good faith of Mr. Dojcinovic in requiring, as he saw it, that the terms of the "subcontracting" clause of the collective agreement be adhered to, *and* to the knowledge that the Union had of the situation (sufficient knowledge to hold back from Mr. Mueller a Union card), we are not prepared to go behind that arrangement and examine its status, with a view to possibly placing the liability for the Mueller hours on Steve's Sheet Metal. While the combination of an innocent representation on the Union's part and innocent reliance upon it on the respondent's part has led us to this conclusion in the present case, the respondent should be aware that any future "subcontracting" arrangements would, in light of the knowledge he now has of the Union's position, be subject to closer scrutiny under the tests articulated by the Board in the past.

[emphasis added]

2. The applicant submits that the determination by the Mitchnick panel of the (employment) status of the respondent is binding on this panel; in other words, that the issue is *res judicata*. In that regard, counsel submits that the respondent had to be, during the material times, either an 'employee' as defined by the Act or an independent contractor, and that that issue has been determined by the Mitchnick panel. In addition, counsel submits that the fact that the respondent signed what purports to be a collective agreement with the union means that he was an independent contractor. In the alternative, and if we do not agree with these submissions, counsel requested this panel 'reconsider' the decision of the Mitchnick panel. The respondent, who was not represented by counsel, adopted a contrary position.

3. *Res judicata* is a common law doctrine which was developed by the Courts to preclude parties or their privies from relitigating issues that had already been resolved by a final judgement of a court of competent jurisdiction. In effect, such a previous decision creates an estoppel which can take 2 forms: cause of action estoppel and issue estoppel. Regardless of its form, the essence of the estoppel that is created is that once a right, question, or fact distinctly put in issue, is directly determined by a court of competent jurisdiction, it cannot be relitigated in subsequent proceedings between the same parties or their privies. A right, question, or fact once so specifically determined is taken to be conclusively established for so long as the judgement of the Court that determined it stands, unless a litigant otherwise bound by that previous determination can establish that there exist a fact which both entirely changes the situation and could not by reasonably diligence have been previously ascertained (see *Angle v. Minister of National Revenue*, [1975] S.C.R. 248; *Town of Grandview v. Doering*, (1975) 61 D.L.R. (3d) 455 (S.C.C.)).

4. It is not clear that the Board is bound to apply the doctrine of *res judicata*, particularly when it sits as an arbitrator under section 124 of the Act. However, the Board has applied that doctrine, or one analogous to it, so as to ensure that, subject to its power to reconsider any decision under section 106(1) of the Act, its decisions will be final and conclusive of the questions or facts that it adjudicates (see *Arnold Markets Limited*, 62 CLLC para. 16221; *Canadian General*

Electric Company Limited, [1978] OLRB Rep. April 384; *K-Mart Canada Limited*, [1981] OLRB Rep. Feb. 185 among others).

5. It is clear, however, that neither *res judicata*, nor any doctrine analogous to it, to operate against anyone who was not either a party to the prior proceedings or someone claiming under or through such a party (see *Angle v. Minister of National Revenue*, *supra*; *Town of Grandview v. Doering*, *supra*; *Mr. Grocer, Willett Foods Limited*, [1986] OLRB Rep. Oct. 1364; *Oakwood Park Lodge*, [1980] OLRB Rep. Oct. 1501; and *Valentine Enterprises Contracting Limited*, [1980] OLRB Rep. June 807 where it was held that the dismissal of one union's claim that two employees be declared a single employer did not bar another trade union's claim for such a declaration with respect to the same employers).

6. The respondent in this proceeding is Helmut Mueller. Neither he personally nor Mueller Sheet Metal, which is an unincorporated sole proprietorship through which he carries on business, were parties to the proceedings before the Mitchnick panel in *S. N. Ventilation Heating Limited*, *supra*. Consequently, it is not appropriate that Mr. Mueller be bound by any of findings of the Mitchnick panel and we reject the trade union's submissions in that regard. In this proceeding, the trade union claims under an agreement between the Sheet Metal Workers' International Association Local Union No. 537, Ontario Sheet Metal Workers' Conference and Mueller Sheet Metal. In order for it to succeed in its claim, it must establish that the respondent was an "employer" at the material times, and that the "agreement" is a collective agreement that applies to the work claimed by it. These are the issues before the Board in this proceeding.

7. The evidence before us establishes that S. N. Ventilation Heating Limited, which carries on business as Steve's Sheet Metal Company (hereinafter "S. N. Ventilation") is bound to a provincial "I.C.I." collective agreement between the Ontario Sheet Metal and Air Handling Group and the Sheet Metal Workers' International Association and Ontario Sheet Metal Workers' Conference for Locals 30,47, 235, 269, 392, 397, 474, 504, 537, 539 and 562. This agreement specifies that all persons employed to do sheet metal work by employers bound by it must be members of the listed local unions, of which the applicant is one. It further provides that any subcontracting of sheet metal work must be to an employer bound by the agreement. The respondent was generally aware that S. N. Ventilation was bound to the collective agreement and was required to hire members of the applicant to do its "I.C.I." sheet metal work. In addition, the evidence discloses that Mr. Mueller, established what appears on its face to be a sole proprietorship under the name of "Mueller Sheet Metal" in 1974, that he identifies himself as being self-employed on his income tax returns, and that he does not receive a statement of earnings from S. N. Ventilation for tax purposes. In addition, he has referred to and held himself out to be an independent contractor. He is not, and was not at any material time, a member of the applicant. He sought to become a member in February, 1985, was rejected, and instead signed what purports to be a collective agreement with the applicant. The only evidence before us of the purpose for which the respondent entered into this agreement is that he wanted to be a union contractor and have the applicant supply him with employees. There is no evidence before us that he made any representations to the applicant with respect to his relationship with, or any work to be performed for, S. N. Ventilation. Nor is there any evidence before us of any discussions between Mr. Mueller and Mr. Dojcinovic. Consequently, there is no evidence before this panel to permit us to make any of the findings of fact made by the Mitchnick's panel in paragraphs 3 and 4 of the *S. N. Ventilation Heating Limited* decision *supra*.

8. Subsequently, the respondent performed work for S. N. Ventilation. Whatever he may be for income tax purposes, we are satisfied on the evidence before us, Mr. Mueller was, for labour relations purposes, an employee of S. N. Ventilation during the period for which the trade

union claims damages, namely March, 1985 through April 1986. Superficially, Mr. Mueller may appear to be an independent contractor. However, in determining whether a person is an "employee" for labour relations purposes, the Board concerns itself with the substance of the working relationship and not its mere form or label. In assessing the true nature of the relationship, the Board applies the fourfold test of *Montreal v. Montreal Locomotive Works Ltd. et al.* [1947] 1 D.L.R. 161 in the context of the overall organization of the operation, the organization test being one that was applied in *Koch v. The Trustees of the Ottawa Civic Hospital*, [1979] 3 ACWS 201 (Ont. H.C.) (see *Babco Plumbing Services Limited*, [1985] OLRB Rep. Dec. 1693; *K-Mart Canada Ltd.*, [1983] OLRB Rep. May 649, among others). Although he professes to be a self-employed contractor, Mr. Mueller, who has never had any employees, has worked for only S. N. Ventilation for approximately five years. He has regular scheduled hours of work, including specific starting and stopping times; he reports to and works at the shop, not the job site; he is paid the same regular hourly wage rate, which is established by S. N. Ventilation, regardless of what work he is performing and regardless of what profit or loss may result from the work undertaken; the work he does is determined by work orders given to him by S. N. Ventilation and he plays no part in selecting what work will be done, what jobs will be accepted or the costing thereof; and there is no indication that he uses tools and materials other than those supplied by S. N. Ventilation. In our view, on the tests applied by the Board, Mr. Mueller was, at all material times, an employee of S. N. Ventilation within the meaning of the *Labour Relations Act*.

9. On its face, our decision in this respect may appear to be at odds with the decision of the Mitchnick panel. However, it is also readily apparent that the evidence before the Mitchnick panel was radically different from that before us. It appears that the Mitchnick panel heard only from Mr. Dojcinovic, the principal of S. N. Ventilation, with respect to the nature of that company's relationship with Mr. Mueller. We heard evidence on that issue only from Mr. Mueller himself, even though Mr. Dojcinovic was subpoenaed by the union and gave evidence with respect to other issues. It appears therefore that each panel had a different part of the relevant evidence before it, but that neither panel had the benefit of all of the relevant evidence. Of course, each panel must decide the application before it on the basis of the evidence that it hears and is not entitled to speculate that other evidence may exist. Absent the application of *res judicata* or some doctrine analogous thereto, findings in a previous proceeding are not evidence in a subsequent proceeding. In this instance, though the result may be an unhappy one from the union's perspective, it ought not to be surprising.

10. Finally, even if we have the jurisdiction to do so in the context of this proceeding, which we doubt, we do not find it appropriate to attempt a reconsideration of the decision of the Mitchnick panel, as suggested by counsel. There is no proper request for reconsideration before us. Further, any reconsideration would be with respect to a finding of fact of the Mitchnick panel. We know neither the details of the evidence placed the Board in the prior proceeding, nor what evidence, if any, became available subsequent to the decision in that proceeding that could not by reasonable diligence have been previously ascertained and adduced. On the basis of the information before us, we are not prepared to grant such a request.

11. In the result, we find that the respondent was not an employer during the material times and that he is therefore not liable to any claim made by the applicant with respect to the work claimed herein by the trade union. In view of that finding, it is unnecessary for us to decide whether or not the agreement between the parties is a collective agreement, a proposition which is not free from doubt (see *International Union of Operating Engineers, Local 793* [1981] OLRB Rep. June. 692; *Nicholls - Radke and Associates Limited*, [1982] OLRB Rep. July 1028).

12. The grievance is dismissed.

1730-86-R Sheet Metal Workers' International Association Local Union 537, Applicant, v. **Naylor Group Incorporated**, Respondent, v. Group of Employees, Objectors

Bargaining Unit - Certification - Construction Industry - Whether employees engaged in sheet metal work but not journeymen sheet metal workers or registered sheet metal apprentices should be included in bargaining unit - Board declining to reconsider its practice of excluding such employees as enunciated in *Irvcon Roofing*

BEFORE: *Judith McCormack*, Vice-Chairman, and Board Members *W. H. Wightman* and *J. Redshaw*.

APPEARANCES: *Arthur L. Moore, Larry O'Neill* and *Owen Pettipas* for the applicant; *Carl Peterson, Paul Wrigley* and *Tom Hitchman* for the respondent; *Douglas Bowman* and *Carl Hughes* for the objectors.

DECISION OF JUDITH McCORMACK, VICE-CHAIRMAN AND BOARD MEMBER J. REDSHAW; October 17, 1986

1. This is an application for certification pursuant to the construction industry provisions of the *Labour Relations Act*.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on April 28, 1986, the designated employee bargaining agency is the Sheet Metal Workers' International Association and The Ontario Sheet Metal Workers Conference consisting of Locals 30, 47, 235, 392, 473, 504, 537, 539, 562 and 269 of the Sheet Metal Workers' International Association.
3. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

4. The parties were in dispute as to the appropriate unit of employees for collective bargaining. The applicant took the position that the appropriate unit was one which was restricted to journeymen sheet metal workers and registered sheet metal apprentices, while the respondent argued that the bargaining unit should include all employees engaged in sheet metal work, whether or not they were journeymen sheet metal workers or registered sheet metal apprentices. In the circumstances of this case, the bargaining unit suggested by the respondent would thus include three

employees who are either journeymen or registered apprentices in other trades or who are not registered in any craft, but who are alleged to be performing sheet metal work. The petitioners took no position on the issue of the appropriate bargaining unit.

5. In support of its position, the applicant referred the Board to *Irvcon Roofing and Sheet Metal (Pembroke) Limited*, [1981] OLRB Rep. Nov. 1594 and argued that the Board has consistently excluded sheet metal workers who are not journeymen or registered apprentices since that decision. The reasoning in *Irvcon Roofing*, *supra*, was urged upon us, and the need for stability was noted inasmuch as the *Irvcon* case had worked to the disadvantage of the applicant in the past, and should not now be overturned when it supported the applicant's position.

6. The respondent argued that the Board's focus had been too narrow, and that employees working side by side performing exactly the same work should be included in the same bargaining unit. Counsel asked the Board to reconsider its practice as set out in *Irvcon Roofing*, *supra*, on the basis that the test for the appropriate bargaining unit should not be so closely linked to the requirements for practising a trade under the *Apprenticeship and Tradesmen's Qualification Act*, R.S.O. 1980, c.24.

7. After reviewing the submissions of the parties, the Board made the following oral ruling:

The Board finds (Board Member W. H. Wightman dissenting) that all journeymen sheet metal workers and registered sheet metal apprentices, in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining. Our written reasons will follow.

We now set out the basis of our decision.

8. One of the primary characteristics of the construction industry is the degree to which it is organized on the basis of specialization. As the report of the *Royal Commission on Labour Management Relations in the Construction Industry* (Carl Goldenberg, March 1962) noted at page 4:

The nature of [the construction industry's] products and the product market require a high degree of mobility and flexibility in the industry. It operates on the principle of specialization, which is reflected in the organization of construction firms by specialty trades and the parallel organization of the work force by crafts.

As a result, craft unions have played a major role in the collective bargaining structure of this sector, a role which was originally protected under the *Labour Relations Act* by section 6(3) which provides as follows:

Any group of employees who exercise technical skills or who are members of a craft by reason of which they are distinguishable from the other employees and commonly bargain separately and apart from other employees through a trade union that according to established trade union

practice pertains to such skills or crafts shall be deemed by the Board to be a unit appropriate for collective bargaining if the application is made by a trade union pertaining to such skills or craft, and the Board may include in such unit persons who according to establish trade union practice are commonly associated in their work and bargaining with such group, but the Board shall not be required to apply this subsection where the group of employees is included in a bargaining unit represented by another bargaining agent at the time the application is made.

9. Of course, the application of section 6(3) was not restricted to the construction industry. However, it had particular significance for the construction sector because of the predominance of craft unions. As the Board pointed out in *Kent Tile & Marble Co. Ltd.*, 61 CLLC ¶ 16,204:

We are of opinion that the words that were added to subsection 2 of section 6 [now section 6(3)] by the *Labour Relations Amendment Act, 1960*, confer upon the Board a discretion where an applicant seeks to sever a craft unit from an established unit, the employees in which are represented for collective bargaining by an incumbent trade union. In a case where there is no incumbent union, the Board is still bound by the mandatory provisions of the subsection to recognize craft rights in the circumstances indicated in the subsection. Where there is an incumbent, the provision as to craft privileges which was, as we pointed out, of a mandatory nature before the amendment, has been converted by the amendment into a discretionary one, but with a legislative instruction that the Board should give consideration to craft privileges and determine in all the circumstances of the particular case whether craft privileges should or should not be recognized. *In the construction industry, where organization has traditionally been carried on on a craft basis, it is our opinion that great weight must be given to craft interests.*

[emphasis added]

10. The current scheme under the Act for construction industry labour relations is based largely on a bargaining structure which evolved from these craft distinctions. Under section 139(1) of the Act, the Minister may designate employee bargaining agencies to represent provincial units of affiliated bargaining agents and may describe those units. In the instant case, the applicant is designated to represent journeymen and apprentice sheet metal workers, sheeters, sheeters' assistants and material handlers by virtue of the designation order referred to earlier. Section 144(1) then provides certain minimum requirements with respect to the scope of the bargaining unit in an application for certification which concerns the industrial, commercial and institutional sector. Thus the collective bargaining structure contemplated by these provisions continues to reflect the pattern of specialization in the construction industry at the same time that it provides for greater stability in labour relations.

11. In determining the parameters of a bargaining unit in this context, it is then both logical and appropriate for the Board to examine the requirements for the practice of the trade in question. In *Irvcon Roofing, supra*, the Board found that sheet metal work had been designated as a certified trade under the *Apprenticeship and Tradesmen's Qualification Act* with the effect that persons who did not hold a certificate of qualification in this trade were prohibited from working or being employed in it, and would be outside the ambit of the provincial collective agreement. Consequently, the Board found that unregistered sheet metal apprentices should be excluded from the bargaining unit.

12. The Board came to a similar conclusion in *Mechanical Insulations Roofing & Siding Ltd.*, [1985] OLRB Rep. April 549. In that case a differently constituted panel of the Board reaffirmed the reasoning in *Irvcon Roofing, supra*, and further pointed out that under the *Apprenticeship and Tradesmen's Qualification Act*, it would be an offence for an unqualified person to engage in sheet metal work and that conviction could make the offender liable to a fine of not more than a thousand dollars. As a result, the Board again excluded unregistered apprentices from the bargaining unit.

13. We find both the *Mechanical Insulations* and the *Irvcon Roofing* cases compelling in the context of the instant case. While the arguments advanced by counsel for the respondent might be attractive in another labour relations setting, given the unique historical and organizational features of the construction industry and the specific legislative requirements attached to the sheet metal trade, we do not find them persuasive.

14. This panel is not seized of the matter.

DECISION OF BOARD MEMBER W. H. WIGHTMAN;

1. The unique historical and organizational features of the construction industry have led to the present situation wherein craft unions not only do battle among themselves, which was predictable, find themselves collectively under siege from unions which operate with composite crews.

2. The use of substitute materials and changes in construction methods are two further realities which have placed unions representing craftsmen in the unhappy position of fighting constant rearguard actions to preserve what they perceive to be "their turf".

3. The evidence of the inability of craft unions to accommodate to these contemporary realities is clear. They appear doomed to continuing wars of attrition which damage not only the unions in an institutional sense but, more important, the craftsmen members whose interests constitute the *raison d'être* for their existence.

4. This is not a situation which can be helped by attempting to lay blame. The craft unions are reacting predictably and understandably to the circumstances in which they find themselves, and they do so in the only manner they see open to them. Both the unions and union members are victims and they need help, some of which may have to come in the form of legislation which, I would emphasize, is not for this Board to comment upon.

5. It is however within the purview of the Board, to interpret the existing legislation in ways which may prove helpful to the individual workers, the union or, if possible, *both*.

6. The fact situation in this case is that new employees have an opportunity to gain working experience such as to allow them to make an informed choice as between the trades they may ultimately wish to follow. The composition and structure of the workforce also allows and contemplates the possibility of workers moving from one craft to another or perhaps qualifying in two or more crafts. All of the foregoing seems to me both socially desirable and in the interests of the individuals.

7. The majority decision, while it may be consistent with Board case law (which is not a requirement of the administrative tribunal), further entrenches the rigid lines of demarcation which are at the source of the dilemma faced by all craft unions. In my view it is the type of decision which makes the Board part of the problem rather than a facilitator of solutions

1730-86-R Sheet Metal Workers' International Association Local Union 537, Applicant, v. **Naylor Group Incorporated**, Respondent, v. Group of Employees, Objectors

Bargaining Unit - Construction Industry - Whether disputed employees "registered" sheet metal apprentices pursuant to *Apprenticeship and Tradesmen's Qualification Act* - Filing of contract of apprenticeship with Director of Apprenticeship minimum condition for determination

BEFORE: *N. B. Satterfield*, Vice-Chairman, and Board Members *D. A. MacDonald* and *J. Redshaw*.

APPEARANCES: *Arthur L. Moore* and *Larry O'Neill* for the applicant; *Carl Peterson*, *Tom Hitchman* and *Paul Wrigley* for the respondent; *Douglas Bowman* and *Carl Hughes* for the group of employees.

DECISION OF THE BOARD; November 13, 1986

1. This application for certification came before the Board as constituted herein for hearing on October 31, 1986. The parties were agreed that the Board, differently constituted, had previously dealt with all matters arising out of the application to the point where the Board had determined the description of the unit of employees which it found to be appropriate for collective bargaining. The description conforms to the requirements of section 144(1) of the *Labour Relations Act* and reads as follows:

All journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in all other sectors in The Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman.

The parties were further agreed that there were two issues remaining to be determined by the Board as constituted herein:

- (1) Whether three persons, Tom Jordan, Rick Laurien and Darryl Lowenberg are included in the unit described above;
- (2) the weight, if any, to be given to a statement filed in opposition to the application.

2. With respect to the composition of the bargaining unit, the parties had agreed in the earlier proceedings that three persons, John Anderson, Casey Boers and Richard Janssen, classified by the respondent as sheet metal workers, were not employees coming within the bargaining unit described above because they were neither journeymen sheet metal workers nor apprentices legally entitled to work in the sheet metal trade pursuant to *The Apprenticeship and Tradesmen's Qualification Act*, R.S.O. 1980, c. 24. For ease of reference, the Board hereinafter will refer to that Act as the *Apprenticeship Act*. The parties were unable to agree whether Jordan, Laurien and Lowenberg were apprentices within the meaning of that Act and registered sheet metal apprentices as that term is used in the Board's description of the appropriate unit.

3. The Board dealt in the hearing with the statement in opposition to the application (“the petition”), but in this decision it will be dealt with only after the Board has decided the issue with respect to the composition of the bargaining unit.

4. The Board first used the word “registered” in its descriptions of bargaining units comprised of the trade represented by the applicant and its sister locals of the Sheet Metal Workers International Association in its decision in *Irvcon Roofing & Sheet Metal (Pembroke) Ltd.*, [1981] OLRB Rep. Nov. 1594. The bargaining unit description set out above conforms to the description of the bargaining unit set out in *Irvcon* and is a description which the Board has consistently employed in applications for certification by the Sheet Metal Workers International Association and its affiliated bargaining agents under the construction industry provisions of the Act since the *Irvcon* decision. The respondent takes the position that the Board’s decision in *Irvcon*, *supra*, does not reveal what constitutes registration as a sheet metal apprentice. Therefore, in order to decide whether Jordan, Laurien and Lowenberg are to be included in or excluded from the bargaining unit, the Board must first establish what it takes to be a registered apprentice and then decide whether the three persons have satisfied those criteria.

5. The issue calls into play several sections of the *Apprenticeship Act*, namely sections 1(a), (b), (c) and (d); 7(2); 9; 11; 15 and 17 which read as follows:

1. In this Act,

- (a) “apprentice” means a person who is at least sixteen years of age and who has entered into a contract under which he is to receive, from or through his employer, training and instruction in a trade;
- (b) “certified trade” means a trade designated as a certified trade under section 11;
- (c) “Director” means the Director of Apprenticeship;
- (d) “employer” includes the Crown and any other public authority, the Ontario Apprenticeship Institute and any local apprenticeship committee;

...

7.-(2) Notwithstanding any of the provisions of this Act or the regulations, the Director may register any person as an apprentice, or grant a certificate of apprenticeship, a certificate of qualification or a certificate of proficiency to any person, who, in the opinion of the Director, is unable by reason of physical incapacity or other circumstances to take or complete the prescribed course of study or training in a trade or apprentice training program.

[emphasis added]

9.-(1) Every person who commences to work at a trade for which an apprentice training program is established but who does not hold a certificate of apprenticeship or qualification in that trade shall,

- (a) forthwith apply in the prescribed form for apprenticeship in that trade; and
- (b) within three months after commencing to work in that trade, file with the Director his contract of apprenticeship.

(2) Every person who fails to comply with subsection (1) shall, upon the expiration of the period of three months mentioned in clause (1)(b), cease to work in that trade until he files with the Director his contract of apprenticeship or until the Director authorizes in writing the continuation or resumption of such work.

* * *

11.-(1) The Lieutenant Governor in Council may designate any trade as a certified trade for the purposes of this Act, and may provide for separate branches or classifications within the trade.

(2) No person, other than an apprentice or a person of a class that is exempt from this section or a person referred to in subsection (4), shall work or be employed in a certified trade unless he holds a subsisting certificate of qualification in the certified trade.

(3) No person shall employ any person, other than an apprentice or a person of a class that is exempt from this section or a person referred to in subsection (4), in a certified trade unless the person employed holds a subsisting certificate of qualification in the certified trade.

(4) When a trade is certified under subsection (1), a person who is working in the trade at the time that it is certified shall be allowed a period of two years from the first day of the month following the month in which the trade is certified to qualify for a certificate of qualification in the trade, if he,

- (a) is the holder of a certificate of apprenticeship in the trade; or
- (b) satisfies the Director that he has been continuously engaged as a journeyman in the trade for a period of time in excess of the apprenticeship period for the trade; or
- (c) satisfies the Director that he is qualified to work in the trade and meets such other requirements as the Director may prescribe.

* * *

15. Every contract of apprenticeship shall, upon its approval by the Director, be *registered* by him forthwith.

[emphasis added]

* * *

17.-(1) A contract of apprenticeship shall not be terminated before the completion of the apprenticeship period provided therein except by,

- (a) the death of either party;
- (b) consent, express or implied, of the parties; or
- (c) cancellation for cause of the contract.

(2) Where in the opinion of the Director the terms of a contract of apprenticeship cannot be fulfilled to the advantage of either party, he may arrange for the transfer of the contract.

(3) The termination, cancellation or transfer of a contract of apprenticeship shall be noted by the Director on the *registered* copy of the agreement.

[emphasis added]

Section 7 of Ontario Regulation 57 and sections 2 and 11(1) of Ontario Regulation 36 are also relevant to the issue. Regulation 36 is a general regulation under the *Apprenticeship Act* and Regu-

lation 57 regulates the sheet metal trade under that Act. Those sections provide respectively as follows:

Regulation 36

2. An application for apprenticeship in a trade shall be in the form provided by the Minister.

* * *

11.-(1) A contract of apprenticeship shall be in the form provided by the Minister.

* * *

Regulation 57

7. Any person who,

- (a) applies in the prescribed form for apprenticeship in the certified trade; and
- (b) works in that trade for three months or less,

is exempt from subsection 11(2) of the Act.

6. The Board has before it, by agreement of the parties, photocopies of the "Application for Apprenticeship in a Trade" and "Contract of Apprenticeship" forms for each of Jordan, Laurien and Lowenberg.

7. The Board also has before it the testimony of Edward T. Jeffree, Regional Administrator for the Toronto Central Region of the Apprenticeship Branch of the Ministry of Skills Development (the "Ministry"). The Ministry was formally known as the Ministry of Colleges and Universities. The respondent's business location comes within the area served by Jeffree's regional office. Jeffree's responsibilities and those of his office include, amongst other things, the responsibility for receiving and registering applications for apprenticeship under the *Apprenticeship Act*. The exhibits just referred to were processed through Jeffree's branch office.

8. Jeffree described to the Board how applications for apprenticeship are processed through his office. The employee and employer fill out their respective parts of the application, sign them and enter the date of signing. The employer's part includes the date when the employee started employment. The application, together with the required fee is filed with the Ministry's regional office and one of its consultants completes the information in a third part of the form, in consultation with the employee and the employer, signs the form and enters the date of his signature. The information in this part includes an effective date and the hours, if any, to be deducted from the total hours of training as a credit for education or prior experience in the trade. The part of the form to be completed by the consultant also provides for the signature of the consultant's supervisor and the date of that signature. The copies of the three applications which are in evidence before the Board do not bear any supervisor's signature, but it was Jeffree's evidence that he customarily initials each application that is processed through his office.

9. Once an application is properly completed, the branch office prepares the Contract of Apprenticeship form, which is a single, letter-sized page. The principle information filled in by the branch office is the effective date, which is the same effective date as the relevant application bears, the total number of hours of training and instruction which the apprentice undertakes to fulfill, the employer's undertaking to provide the required hours of training and instruction in the particular trade, in this case sheet metal worker, and the minimum wages to be paid for each of five blocks of training and instruction. These rates of wages are expressed in terms of a percentage of

the journeyman's rate. The branch also assigns a contract number to the contract and in the appropriate space enters the date when the contract was produced by the branch (the "Production Date"). The contract form also provides for a date when it is "Approved and Registered". None of the three contracts in evidence have that date completed. Once a contract is prepared in this form, it is presented to the applicant apprentice and employer to be dated and signed by them.

10. According to Jeffree, the effective date, which is common to the Application for Apprenticeship and the Contract of Apprenticeship, is the date from which the employer is committed to provide training. The effective date may be a date earlier than the date apprenticeship is applied for because training may have commenced before the application was made. The effective date is the point from which all training and instruction is to be credited to the apprentice, but no hours of training and instruction are credited to the apprentice's record with the Ministry until the formal contract has been signed and returned to the Ministry. Jeffree told the Board that the date which should appear opposite the term "Approved and Registered" would be the date when the signed contract has been returned properly completed to the Ministry. It was his view, however, that apprenticeship began once a proper application had been made, signed both by the applicant apprentice and the employer, the fee paid and the effective date set. It is at that point when Jeffree considers an apprentice to be registered and lawfully entitled to work in the trade. This is because there is a formal undertaking in place, in the form of the Application for Apprenticeship, by the employer to provide a specific period of training and instruction in the trade at not less than stipulated rates of payment for each period of instruction and the employer has been informed by the consultant of the applicable minimum rate to be paid.

11. The *viva voce* evidence and the Application for Apprenticeship and Contract of Apprenticeship forms filed in evidence respecting Jordan, Laurien and Lowenberg reveal the applications for apprenticeship in the sheet metal trade were made by or for them, respectively, on August 5, 1986, August 27, 1986 and August 25, 1986 and the requisite fee paid. The corresponding dates when their applications were signed by the respondent are September 23, 1986, August 27, 1986 and August 25, 1986. The effective dates assigned by the Ministry to their applications are, respectively, October 28, 1985, August 28, 1986 and June 23, 1986. These dates correspond to their hire dates, except for Laurien whose effective date is one day later than his hire date. Their Contract of Apprenticeship forms display the same effective dates as their applications. The Production Date of each contract is October 21, 1986, the same date recorded for the employee and employer signature on each contract. As noted already, the Contract of Apprenticeship forms do not bear an "Approved and Registered" date.

12. Respondent counsel submits that the context in which the evidence is to be analysed includes both the description of the unit of employees found by the Board herein to be appropriate for collective bargaining and the concern expressed by the Board in its decision in *Irvcon*, *supra*. When the analysis is made in that context it leads to a reasonable conclusion that an employee is a registered sheet metal apprentice within the meaning of the *Apprenticeship Act* and the Board's bargaining unit description when the following conditions have been satisfied on or before the date of making of an application for certification:

- (1) the employee has made a proper Application for Apprenticeship in the trade;
- (2) the employer has completed properly and signed its part of the application;
- (3) the application has been filed with the Ministry together with the required fee; and

- (4) the Ministry has assigned to the application an effective date which is not later than the date of application for certification.

13. According to respondent counsel, the Board's concern in the *Irvcon* case was that it not describe a unit of sheet metal workers which would include persons who were prohibited from working in that trade. That concern, counsel says, is evident from paragraph 9 of the decision in which the Board quotes what is now section 11 of the *Apprenticeship Act*. The paragraph reads as follows:

9. We are of the view that the disputed employees should not be listed as employees in a bargaining unit. Section 10 of the *Apprenticeship and Tradesmen's Qualification Act* is quite clear:

10.-(1) The Lieutenant Governor in Council may designate any trade as a certified trade for the purposes of this Act, and may provide for separate branches or classifications within the trade.

(2) No person, other than an apprentice or a person of a class that is exempt from this section or a person referred to in subsection 4, shall work or be employed in a certified trade unless he holds a subsisting certificate of qualification in the certified trade.

(3) No person shall employ any person, other than an apprentice or a person of a class that is exempt from this section or a person referred to in subsection 4, in a certified trade unless the person employed holds a subsisting certificate of qualification in the certified trade.

By Regulation 298/73 the Lieutenant Governor in Council designated the trade of sheet metal worker as a certified trade for the purposes of that Act. It is our view that the appropriate bargaining unit for collective bargaining with respect to sheet metal workers should reflect that designation. Accordingly, in the present case the bargaining unit shall be described in terms of "journeymen sheet metal workers and registered sheet metal apprentices". It follows, therefore, that the three employees in question will not be employees on the list of employees for the purposes of the count.

While the Board found that three persons in dispute were not registered apprentices within the meaning of the *Apprenticeship Act*, and therefore not in the unit, it does not discuss what, in the Board's view, constitutes a registered apprentice. Counsel points out that the *Apprenticeship Act* does not employ the term registered apprentice. Counsel argues, however, that it is reasonable to conclude that the Board in *Irvcon* was simply making sure that the way in which it described the unit appropriate for collective bargaining properly respected the strictures of the *Apprenticeship Act* as to who could lawfully work in the sheet metal trade. It determined that the bargaining unit should be described to include only persons who were journeymen qualified under the *Apprenticeship Act* and apprentices lawfully entitled to work under that Act. Therefore, the term "registered" should be read to mean an apprentice who can lawfully work in the trade.

14. That conclusion, counsel contends, is supported by the Board's decision in *C T Windows Limited*, [1983] OLRB Rep. May 627. In that case, the Board was being asked to apply the principle of the *Irvcon* decision and find that certain disputed employees were not included in a bargaining unit described in terms of a certified trade. The Board commented as follows at paragraph 6:

6. In the *Irvcon* decision the Board had refused to include on a list of employees in the bargaining unit three employees who were performing sheet metal work, but who were neither certified tradesmen nor registered apprentices pursuant to the *Apprenticeship and Tradesmen's Qualification Act*. The basis for such a decision was section 10 [section 11] of the *Apprenticeship and Tradesmen's Qualification Act* which prohibits persons other than certified tradesmen or registered apprentices from performing work in a certified trade. The Board, in effect, refused to

recognize them as employees in the bargaining unit because they were clearly not lawfully employed in the performance of sheet metal work in view of the *Apprenticeship and Tradesmen's Qualification Act*.

15. The Board's concern expressed in those two decisions would be satisfied, counsel submits, by the meeting of the conditions outlined in paragraph 12 above because, at the point they are met, the employer is under a contractual obligation to provide training and instruction in the sheet metal trade and at a rate of pay not less than the rate of which the consultant has advised the employer. Thus a *de facto* contract exists and the employer and employees have met the requirements of section 11 of the *Apprenticeship Act*. Counsel contends that the judgement of the Provincial Court (Criminal Division) Judicial District of York in *R v. Avtar Singh* supports the proposition that those conditions constitute a Contract of Apprenticeship. Therefore Jordan, Laurien and Lowenberg would be registered sheet metal apprentices within the requirements of the *Apprenticeship Act* and within the meaning of the term as it is used by the Board to describe the appropriate bargaining unit for this applicant.

16. Should the Board not find that those conditions constitute a Contract of Apprenticeship counsel argues in the alternative that, where those conditions exist, employees would still be lawfully at work on the date of an application for certification by virtue of section 7 of Ontario Regulation 57 set out above if they were within the first three months of employment. That section exempts from subsection 11(2) of the Act persons who have worked in a certified trade for three months or less and who have applied in the prescribed form for apprenticeship in that trade.

17. If the Board accepts either argument, Laurien and Lowenberg would be included in the bargaining unit which the Board has found to be appropriate and Jordan would be excluded. This would be because, pursuant to counsel's first argument, with respect to Laurien and Lowenberg, Applications for Apprenticeship were signed, filed with the required fee prior to September 12, 1986, the date on which this application for certification was made, and have been assigned an effective date which is not later than September 12th. Therefore, pursuant to counsel's argument, a Contract of Apprenticeship existed as at September 12th, 1986. In the alternative, if the Board finds that no Contract of Apprenticeship exists, as of September 12th, 1986, Laurien and Lowenberg had made proper Applications for Apprenticeship and had been employed for less than three months. Therefore, they were lawfully employed pursuant to section 7 of Ontario Regulation 57 and section 11(2) of the *Apprenticeship Act*. On the other hand, Jordan would be excluded under the first argument because his Application for Apprenticeship was signed by the employer after September 12th, 1986, and under the second argument because he had been employed in the trade for more than three months at the time his Application for Apprenticeship was made.

18. The Board disagrees with respondent counsel that any of the three employees are apprentices pursuant to the *Apprenticeship Act*. Section 1(a) defines apprentice to mean "... a person who is at least sixteen years of age and who has entered into a contract under which he is to receive, from or through his employer, training and instruction in a trade". The filing of an Application for Apprenticeship, the payment of the requisite fee and the setting of the effective date for the application, together with an instruction from the Ministry's consultant as to the journeyman's rate on which the employer is to base the minimum apprenticeship rate to be paid to the apprenticeship applicant does not, in the Board's view, constitute evidence of a Contract of Apprenticeship in the common law sense. There is no evidence before the Board that the respondent had undertaken and the employees had accepted a rate of pay which satisfied the requirements of the Act. Nor does the Board read the judgement in the *Singh* case, *supra*, that such conditions constitute a Contract of Apprenticeship. The defendant Singh was found guilty of having violated the *Apprenticeship Act* by failing to pay the required rates under a Contract of Apprenticeship. It is

clear from the judgement that the Court had before it a formal Contract of Apprenticeship and was not relying simply on the Application for Apprenticeship.

19. Should the Board be wrong and should the conditions cited by counsel be a Contract of Apprenticeship in common law, it is not a Contract of Apprenticeship within the meaning of the *Apprenticeship Act*. While it may be argued such a contract would satisfy section 1(a) of that Act, other sections of the Act and its Regulations cause the Board to conclude that it does not.

20. It is beyond dispute that section 9 of the *Apprenticeship Act* applies to a certified trade like the sheet metal trade. Subsection 1 of section 9 requires persons not qualified in the trade to "... forthwith apply in the prescribed form for apprenticeship in that trade; and within three months after commencing work in that trade, file with the Director his Contract of Apprenticeship" (emphasis added). Ontario Regulation 36 requires that an Application for Apprenticeship be in the form provided by the Minister (section 2) and section 11(1) requires that a Contract of Apprenticeship be in the form provided by the Minister. Therefore, in the Board's view, when section 1(a) of the *Apprenticeship Act* uses the word "contract" in defining apprentice, it is referring to a contract in the form prescribed by the Regulations under the Act. Similarly, this is the form of contract being addressed by section 15 of the *Apprenticeship Act* when it says "[e]very contract of apprenticeship shall, upon its approval by the Director, be registered by him forthwith". None of the three employees had signed a Contract of Apprenticeship with the respondent in the form prescribed by the Act and its Regulations on or before September 12, 1986. It follows, therefore, that none had filed contracts in the prescribed form with the Director of Apprenticeship for his approval and registration pursuant to section 15. It is not unreasonable to conclude in the circumstances that none of the three were apprentices under the Act and, if they are not apprentices, it follows that they could not be registered apprentices as that term relates to the requirements of the *Apprenticeship Act*.

21. That conclusion is supported by the Board's decision in *Castle Plumbing and Heating Inc.*, Board File No. 0076-85-R, an unreported decision which issued July 22, 1985. The Board in that case was dealing with an issue respecting two employees who, by the date of making of an application for certification, had applied for apprenticeship in the sheet metal trade, were performing work of the trade and awaiting approval and acceptance of their applications. It was an agreed fact that they became "registered" sheet metal apprentices after the certification application date. The decision is silent with respect to what constitutes becoming registered. It would appear from paragraph 6 of the decision set out below, that the Board concluded that a Contract of Apprenticeship becomes registered at the time it is approved by the Director:

6. It is clear that under the *Apprenticeship and Tradesmen's Qualification Act* and the regulations thereunder a contract of apprenticeship is registered after the approval of the Director of Apprenticeship and that Messrs. Beek and MacDonald were by the regulations exempt from the provisions of section 9 of the *Apprenticeship and Tradesmen's Qualification Act* because they had applied in the prescribed form for apprenticeship in the certified trade of sheet metal worker because they apparently worked in that trade for three months or less before becoming registered sheet metal apprentices. However, on the date of the making of the application they were not registered sheet metal apprentices and in determining the number of employees in the bargaining unit for the purpose of the count under section 7(1), the Board includes only those persons who were within the definition of the bargaining unit on the date of the making of the application. Accordingly, John Beek and Steve MacDonald are not included for the purposes of the count.

22. Respondent counsel argues that the Board need not and should not follow the decision in *Castle Plumbing, supra*, because it does not address his alternative argument that the operation of section 7 of Ontario Regulation 57 is sufficient to satisfy the Board's concern about not wishing

to include in the bargaining unit for purposes of the count under section 7(1) of the *Labour Relations Act*, persons who cannot lawfully work in the trade. Counsel submits that anyone working in the sheet metal trade on the date of making of the application should be considered *prima facie* to be included in the bargaining unit unless it is established that they are not lawfully at work in the trade. Persons who have fulfilled the conditions of section 7 of Regulation 57 are exempt from the prohibition set up under section 11(2) of the *Apprenticeship Act* and are entitled to lawfully work in the trade. Therefore, anyone working in the trade for the employer on the certification application date who has satisfied section 7 would be lawfully at work and the Board should include them in the bargaining unit. As the Board has said earlier in the decision, accepting this argument would include Laurien and Lowenberg in the unit.

23. There is no doubt that the Board has discretion to do as counsel argues, the question is whether that would be the appropriate exercise of its discretion. Section 9(2) of the *Apprenticeship Act* makes it clear that the effects of section 7 of Ontario Regulation 57 only exempts an employee in the trade for a three month period from the start of his employment in the trade. If the employee fails to file his Contract of Apprenticeship with the Director before the expiry of the three month period, section 9(2) mandates that the employee cease to work in the trade until he complies with section 9(1)(b). Therefore, it may be seen that the act of filing the Apprenticeship Contract with the Director establishes with greater certainty compliance with section 11 of the *Apprenticeship Act*. While the Board in the *Irvcon* decision did not explicitly address this issue, it seems to recognize the effect which would come from a filing of a Contract of Apprenticeship with the Director when it states as follows at paragraph 7:

7. In the context of the present case, of course, to adopt the applicant's position would mean that the employees in question are not employees in the bargaining unit. They would not be entitled to any voice in the determination as to whether the applicant trade union should be entitled to represent sheet metal workers, *but it also follows that if the applicant trade union were certified they would not be able to continue as employees unless they became registered apprentices.*

[emphasis added]

24. Having regard to all of the foregoing, to the provisions of the *Apprenticeship Act* and its Regulations and to the evidence before the Board herein, those persons who on September 12th, 1986, would be registered sheet metal apprentices in the bargaining unit found herein to be appropriate for collective bargaining, would be those persons who, on or before that date, had, at the very least, filed with the Director a Contract of Apprenticeship in the form prescribed by the *Apprenticeship Act* and its Regulations. Since no Contract of Apprenticeship in the prescribed form had been filed with the Director by or for Jordan, Laurien and Lowenberg on or before September 12th, none of them were registered sheet metal apprentices on that date. Accordingly, none of them are included in the bargaining unit for purposes of the count.

25. The Board is satisfied that there were eight employees of the respondent in the unit described above on September 12, 1986, and that more than fifty-five per cent of them, at the time the application was made, were members of the applicant on July 12, 1985, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

26. A timely statement in opposition to the application ("a petition") has been filed with the Board, however. For reasons given orally in the hearing, the Board finds that the petition expresses the voluntary wishes of those persons who signed it. The petition contains the signatures of a sufficient number of the employees for whom the applicant trade union has filed documentary

evidence of membership, to raise doubt whether it continues to enjoy the support of enough of the persons who are its members, within the meaning of section 1(1)(l) of the Act, to be certified by the Board without need for a representation vote. Accordingly, the Board will exercise its discretion under section 7(2) of the Act to direct that a representation vote be taken.

27. Accordingly, a representation vote will be taken of the employees of the respondent in the bargaining unit. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

28. Voters will be asked to indicate whether they wish to be represented by the applicant in their employment relations with the respondent.

29. The matter is referred to the Registrar.

2058-85-M Laborers International Union of North America, Local 607, Applicant, v. Rino Zanette (1981) Ltd., Respondent

Construction Industry Grievance - Practice and Procedure - Witness - Refusal by president of respondent to comply with Board direction to answer specific questions - Powers of Board to punish for contempt in face of the Board

BEFORE: *Ken Petryshen*, Vice-Chairman, and Board Members *I. M. Stamp* and *H. Kobryn*.

APPEARANCES: *S.B.D. Wahl* and *P. Little* for the applicant; *Rino Zanette* for the respondent.

DECISION OF THE BOARD; November 19, 1986

1. This is a referral of a grievance to arbitration under section 124 of the *Labour Relations Act*. In a decision of the Board (differently constituted) dated January 27, 1986, the Board found that the respondent contravened the collective agreement binding upon the respondent and the applicant and accordingly found that the grievance in this matter must succeed. The panel of the Board hearing the grievance on its merits directed representatives of the applicant and respondent to meet and attempt to settle the amount of damages owing to the applicant and indicated that the Board would remain seized of the matter of damages in the event the parties were unable to resolve that issue.

2. The Board was notified that the parties were unable to agree on the question of damages and a hearing to deal with the matter was initially scheduled for June 30, 1986. This hearing was adjourned on the agreement of the parties, at the request of and for the convenience of Mr. Zanette, President of the respondent. The applicant agreed to adjourn the hearing when counsel for the respondent agreed to the following conditions:

- (1) Rino Zanette will personally undertake to appear at any future hearings, together with the company records;
- (2) The conduct money sent to him will be returned; and

- (3) The decertification hearing scheduled for July 7, 1986 will be adjourned and not rescheduled for hearing until seven days after a hearing has been held with respect to the section 124 referral (Board File No. 2058-85-M).

3. The present panel was scheduled to hear the damages issue on October 27, 1986. Mr. Zanette appeared at that time on behalf of the respondent and, at the outset, he requested that the proceeding be adjourned. In order to appreciate the basis for the adjournment request, it is necessary to briefly review some background to the relationship between the respondent and the applicant.

4. In a decision dated January 27, 1984 (Board File No. 1659-83-M), the Board found Rino Zanette Limited and Rino Zanette (1981) Ltd. to be related employers under section 1(4) of the *Labour Relations Act*. No one appeared for the respondents at the hearing of that matter which took place on January 23, 1984. The hearing on the merits of the present section 124 referral was held on December 18, 1985. Just prior to December 18, 1985, the respondent filed an application for judicial review seeking to review the Board's decision dated January 27, 1984 (Board File No. 1659-83-M). Counsel appearing for the respondent at the hearing on December 18, 1985 requested that the hearing on the merits be adjourned pending the outcome of the judicial review proceedings. The Board denied the request for an adjournment and in doing so, made the following comments:

5. ... The decision being judicially reviewed arises out of an entirely different proceeding, and that decision was issued by a differently constituted panel of the Board on January 27, 1984. The respondent waited approximately one year and seven months from the issuance of that decision until filing an application for judicial review. It is worth noting that the respondent did not participate in the proceeding which it only belatedly seeks to challenge by way of judicial review, nor will the respondent be participating in the Board proceeding should it continue today.

6. Counsel for the respondent did not indicate any reason for the long delay in seeking judicial review, nor was any reason provided as to why no notice of the request for adjournment had been provided to the applicant. Nor did the respondent explain why this proceeding had been adjourned on a prior date at its request.

7. For the above reasons the Board indicated that it would not grant the adjournment and would be proceeding forthwith with the hearing. To grant an adjournment in such circumstances would be to allow unconscionable delay in labour relations proceedings where expediency is often critical. The respondent did not participate in the earlier proceeding, has indicated that it will not be participating in this proceeding, provided no notice of the request for adjournment, provided no reason for an almost two year delay in launching its judicial review, and in any event seeks judicial review of a different proceeding, which at least from a reading of the decision in that proceeding does not involve issues concerning the Board today.

5. In requesting the Board to adjourn the hearing on October 27, 1986, Mr. Zanette indicated that the respondent should have the opportunity to defend itself on the related employer issue. We understood this to mean that Mr. Zanette wanted the still outstanding judicial review application to be decided before the Board proceeds with the hearing into the question of damages. In other words, Mr. Zanette was requesting an adjournment on the same basis as his counsel requested an adjournment of the hearing into the merits of the section 124 referral. In addition, Mr. Zanette requested that the Board proceed with the termination application prior to dealing with the issue of damages in the section 124 application. Mr. Zanette made a point of indicating he was not served with a Summons to Witness for the October 27th, 1986 hearing.

6. Counsel for the applicant opposed the adjournment. Counsel advised the Board of the history of this proceeding and argued that there was no valid basis for granting an adjournment. Counsel indicated there had been no prior indication that a request would be made for an adjournment.

ment. We were advised that Mr. Zanette failed to comply with the Board's direction in its decision of January 27, 1986 to meet with a representative of the applicant in order to attempt to settle the amount of the damages claim. Counsel advised us that Mr. Zanette had not complied with a condition of the adjournment, namely the returning of \$425.00 in conduct money to the applicant. Counsel indicated that the application for judicial review had not yet been perfected.

7. After considering the submissions of the parties on the request for an adjournment, and after recessing to consider the matter, the Board advised the parties orally at the hearing that it denied the adjournment request. The resolution of the outstanding issue of damages had been delayed for over seven months and the delay was solely attributable to the respondent. We were not provided with any reason why the application for judicial review had not been perfected, nor was any reason provided as to why no notice of the request for an adjournment had been provided to the applicant. The respondent did not take issue with the previous Board decision denying the adjournment or in allowing the grievance until Mr. Zanette appeared before us on October 27th. The termination application is not before us and we note that an agreement was reached previously between the parties with respect to its scheduling as a condition of the June 30th adjournment. The legislature clearly intended that section 124 referrals be dealt with expeditiously. To grant an adjournment in these circumstances would only result in further unnecessary delay. We hereby confirm our oral ruling.

8. After advising the parties of our oral ruling on Mr. Zanette's adjournment request, we suggested that the parties may want to spend some time with a Board Officer to assist them in determining the quantum of damages. Mr. Zanette was not prepared to meet with a Board Officer for this purpose. The Board asked the applicant to present its evidence and it began by calling Mr. Zanette as a witness.

9. This case was not completed on October 27, 1986. It was not completed essentially because Mr. Zanette refused to answer some questions put to him by counsel for the applicant and which he was directed to answer by the Board. In order to appreciate what occurred while Mr. Zanette was testifying, it is necessary to relate the nature of the grievance which succeeded on its merits.

10. The applicant alleged that the respondent failed to use members of the applicant with respect to construction work performed by the respondent at six different construction sites. After hearing the applicant's evidence and its counsel's submissions, the Board (differently constituted) in a decision dated January 27, 1986, held that the respondent breached the terms of the relevant collective agreement. The Board found that the respondent was involved in construction work on six construction sites which should have been performed by members of the applicant. Those six construction sites are listed below:

1. CNR Hostel, Atikokan, near 109 White Street.
2. Commercial building across the street from Marostica Motors, 10th Avenue, Thunder Bay.
3. Arnone Transport Limited Garage, 235 Queen Street, Thunder Bay.
4. Halfway Motors Limited, Memorial Avenue, Thunder Bay.
5. Commercial Building, 1313 Brown Street, Thunder Bay.
6. Near the Valencia Restaurant, 105 Main Street West, Atikokan.

11. While Mr. Zanette was on the witness stand, counsel for the applicant began asking him a number of questions concerning the CNR Hostel job. Counsel asked Mr. Zanette to describe the work performed on the job and how many drillers were on the job. Mr. Zanette refused to answer these questions. He indicated that he was the supervisor on the job but that the work was not performed by the respondent's employees. Counsel for the applicant asked us to direct Mr. Zanette to answer the question. We declined to make such a direction at that point in time. Instead, we advised Mr. Zanette we would ask counsel for the union to move on to questions concerning the other job sites. We explained to Mr. Zanette that the union will probably wish to return to the CNR Hostel job at some point and that we may, assuming we decided the questions were relevant, direct him to answer the questions. The Board advised Mr. Zanette that if it directed him to answer a question and he refused to answer, it was possible that he would be found to be in contempt in the face of the Board. The Board also advised Mr. Zanette that if he was found to be in contempt in the face of the Board, the Board, after hearing submissions, could impose a penalty ranging from a fine to imprisonment. The Board suggested Mr. Zanette should think about these matters and, if possible, consult with counsel during the lunch recess. Counsel for the union then proceeded to ask Mr. Zanette questions concerning the other jobs covered by the grievance.

12. After the lunch recess, counsel for the union asked Mr. Zanette more questions relating to the construction jobs in issue. At one point, Mr. Zanette was asked the name of the person who he alleged was employed by the respondent as a bricklayer. Mr. Zanette refused to answer the question since, in his view, it had nothing to do with labourers. Counsel for the applicant requested the Board to direct Mr. Zanette to answer the question. The Board first heard the parties' submissions with respect to the relevancy of the question and decided the question was relevant. It appeared to us that the applicant was entitled to ask questions to test Mr. Zanette's assertion that the individual he claimed was a bricklayer was, in fact, a bricklayer and not a person performing labourers' duties. To this end, counsel for the applicant was entitled to ask the name of the individual who Mr. Zanette claimed was a bricklayer. The Board then directed Mr. Zanette to answer the question. The question was repeated and Mr. Zanette refused to answer it. The Board explained once again to Mr. Zanette that he could be found in contempt in the face of the Board and what the consequences might be. The Board asked Mr. Zanette if he wanted a few minutes to consider his position. Mr. Zanette indicated to the Board that he did not need any time to consider his position and that he would not answer the question. Mr. Zanette was in breach of an order of the Board.

13. The Board asked Mr. Zanette if he consulted with counsel over the lunch hour. Mr. Zanette indicated that he did consult with counsel about the questions concerning the CNR Hostel job. Counsel for the applicant then proceeded to ask Mr. Zanette some questions about the CNR Hostel job. He was asked the names of the persons who worked on this job. Mr. Zanette refused to answer and indicated he was advised by counsel that he did not have to answer questions about the CNR Hostel job. Mr. Zanette took the position that the work was performed by employees of another company and that he did not have to answer any questions relating to another company. At no time did Mr. Zanette indicate he did not know the answer to the question. The Board entertained submissions with respect to the relevancy of the question and concluded that the question was relevant. In our view, the applicant was entitled to ask Mr. Zanette this question in order to test his assertion that the employees who performed the labourers' work on the CNR Hostel job were not the respondent's employees. The Board directed Mr. Zanette to answer the question. When the question was again put to Mr. Zanette he refused to answer it. Mr. Zanette made it quite clear that he would not answer any questions about the CNR Hostel job or any questions relating to the other jobs which dealt with work performed by persons who Mr. Zanette did not classify as labourers. The Board explained to Mr. Zanette that this was a serious matter and again directed him to answer the specific question put to him by counsel for the applicant. The question

was again put to him and Mr. Zanette again refused to answer the question. In refusing to answer the question, Mr. Zanette breached another order of the Board.

14. The Board advised Mr. Zanette that his refusal to comply with the Board's directions to answer specific questions raised the issue of whether he was in contempt in the face of the Board. The Board requested submissions from the parties as to whether the Board should find Mr. Zanette in contempt in the face of the tribunal. Counsel for the applicant argued that Mr. Zanette was clearly in contempt in the face of the tribunal and that the Board should impose a penalty of incarceration. While Mr. Zanette was making his submissions, the Vice-Chairman asked him if he would like the opportunity to consult with counsel prior to the Board deciding the contempt issue. Mr. Zanette advised the Board that he would like to consult with counsel.

15. After recessing to consider the matter, the Board advised the parties that it would adjourn the proceedings in order to give Mr. Zanette the opportunity to consult with counsel. It appeared to us that the power the Board has to punish for contempt should be used cautiously. Since a possible penalty for contempt in the face of the Board is a jail term, the Board was of the view that it would be appropriate to give Mr. Zanette the opportunity to consult with counsel.

16. At the hearing the Board directed that this matter will continue on December 15, 1986 in Thunder Bay at a location and time to be determined. At that time, the Board will hear further submissions from the parties on the issue of whether or not the Board should find Mr. Zanette in contempt in the face of the Board and, if so found, what penalty it will impose on Mr. Zanette. The Board directed Mr. Zanette to appear at the hearing on December 15, 1986. Of course, Mr. Zanette will be entitled to representation by counsel if he so desires. At the hearing on December 15, 1986, the Board will deal first with the contempt matter and, depending on the determination of that issue, the Board would continue with the evidence relating to the damage claim. The Board explained to the parties at the completion of the hearing day on October 27, 1986, that it intended to follow the above procedure. Before concluding the hearing, the Board explained to Mr. Zanette that it was treating this matter very seriously and that he should do likewise, considering that the possible penalties for contempt in the face of the Board could range from a fine to imprisonment. The Board hereby confirms the directions referred to in this paragraph.

17. In approaching the contempt issue in the manner set out above, we had in mind the powers conveyed to the Board by the *Labour Relations Act* when it acts as an arbitration board. In proceedings before the Board under provisions other than section 124 of the *Labour Relations Act*, where a witness refuses to answer a question to which the Board may legally require an answer, a case may be stated to the Divisional Court, pursuant to section 13 of the *Statutory Powers Procedure Act* (the "S.P.P.A.") and that Court may inquire into the matter and punish or take steps for the punishment of that person in like manner as if he or she had been guilty of contempt of the Court. However, section 3(2)(d) of the S.P.P.A. provides that Part I of the S.P.P.A. (which consists of sections 2 to 25 of that legislation) does not apply to proceedings before an arbitrator to which the *Labour Relations Act* applies. Since the Board is acting as an arbitrator when dealing with matters under section 124 of the Act, the enforcement mechanisms contained in Part I of the S.P.P.A. are inapplicable: *Casabil Contractor Limited*, [1980] OLRB Rep. Sept. 1278, and *Re International Association of Heat and Frost Insulator and Asbestos Workers, Local 95* (1979), 25 O.R. (2d) 8. However, subsection 124(3) of the Act provides that the Board has the powers set out in subsection 44(8) of the Act when it deals with a referral of a grievance to the Board. Subsection 44(8)(a) provides as follows:

44(8) An arbitrator or the chairman of an arbitration board, as the case may be, has power,

(a) to summon and enforce the attendance of witnesses and to compel them to

give oral or written evidence on oath in the same manner as a court of record in civil cases; ...

18. At common law, an inferior Court of Record could commit to prison or fine when confronted with contempt in face of the Court. (See, *Re Diamond and The Ontario Municipal Board*, [1962] O.R. 328). A necessary implication of the powers given to the Board by subsection 44(8)(a) is the power to punish for disobedience of its orders. When the legislature gave the Board the powers of a court of record in civil cases, it conveyed to the Board the authority to fine or commit to prison, or both, for contempt committed in the face of the tribunal. The contempt the Board can address is civil in nature. While the power to punish for contempt is necessary for the proper administration of justice, the Board exercises the power cautiously. Without the power to punish for contempt in the face of the Board, the Board would have considerable difficulty in discharging its functions. Although the following comments of Schroeder, J.A., in *Re Diamond and the Ontario Municipal Board*, *supra*, were made in relation to the OMB, they apply with equal validity to the Labour Relations Board.

"It is necessary in many cases for the Board, in discharging its functions, to ascertain the facts with which it has to deal, and in the conduct of its enquiries it is essential that it possess incidental powers commonly associated with a Court of justice. If it were not invested with the power to punish a witness who refuses to be sworn or to affirm (as the case may be) or who, having been sworn or having affirmed, refuses to answer a question when directed to do so, the administrative machinery of the Board would soon grind to a halt, for the most effective direct sanction commonly available to compel obedience to such an order or direction is the power to hold a recalcitrant witness in contempt and, as a means of coercion, to commit him to prison."

19. This matter is referred to the Registrar.

1519-85-R International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 924, Stratford, Applicant, v. **The Stratford Shakespearean Festival Foundation of Canada**, Respondent

Bargaining Unit - Certification - Whether craft bargaining unit consisting of theatrical wardrobe mistresses and dressers appropriate

BEFORE: R. A. Furness, Vice-Chairman, and Board Members B. L. Armstrong and R. J. Gallivan.

APPEARANCES: T.W.G. Pratt, Debra Yundt and Eva Van der Spek for the applicant; Steven L. Moate, Christopher C. White and Peter S. Roberts for the respondent.

DECISION OF THE BOARD; October 31, 1986

1. The applicant has filed an application for certification in which it seeks to be certified for a bargaining unit of all theatrical wardrobe mistresses and wardrobe attendants (dressers) employed by the respondent in the City of Stratford. The respondent agreed with this description of the bargaining unit.

2. The applicant was advised prior to the hearings that it had not previously been found to be a trade union within the meaning of the *Labour Relations Act*. At the commencement of the hearings, the applicant adduced evidence with respect to its status as a trade union within the meaning of section 1(1)(p) of the Act.

3. Debra Yundt gave evidence that the dressing staff became members of the applicant on August 23, 1984, when they collectively signed the application to charter a local trade union in the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada ("IATSE"). On September 24, 1984, IATSE issued a charter document which, by its terms, granted to the dressing staff, who had signed the application, a charter to bear date October 1, 1984, as Local 924 at Stratford, Ontario, and to be known as "Theatrical Wardrobe Attendants". The applicant previously applied for certification before this Board. See *The Stratford Shakespearean Festival Foundation of Canada*, Board File No. 1646-84-R, an unreported decision dated December 4, 1984. In that earlier decision the Board dismissed the application for certification on the grounds that the applicant was not in existence when the application was filed and also because the evidence of membership which had been filed was with respect to an entity which was not specifically identified and not yet in existence. The instant application was filed after October 1, 1984, and the evidence of membership which has been filed indicates membership in the applicant during 1985. The problems which caused the Board to dismiss the first application in 1984 are not present in this application.

4. As was referred to earlier, the dressing staff of the three theatres at Stratford (the Festival Theatre, the Avon Theatre and the Third Stage) met together in August of 1984 for the purpose of discussing common problems and working conditions. They discovered that they were interested in forming a trade union for the dressing staff. On August 23, 1984, the dressers met with the president of IATSE Local 357 (the local trade union for stagehands at the three theatres at Stratford) and discussed the possibility of forming a trade union. The procedures for forming a trade union were considered. The president of Local 357 answered questions and was asked if the dressing staff could join Local 357. The president expressed the opinion that the dressing staff's work was substantially different from the stagehands' work and believed that Local 357 would have to alter its constitution and bylaws in order to admit the dressing staff into membership. The president expressed the view that it would be easier for the dressing staff to apply for a separate charter from IATSE. At this point the dressing staff each donated ten dollars and signed an application for a charter in IATSE.

5. The dressing staff were erroneously advised that a charter had been approved by IATSE in New York on September 21, 1984. The president and business representative of Local 357 and an international vice-president advised the dressing staff of the procedure for electing a temporary executive at that time. On September 24 and 25, 1984, the dressing staff considered the constitutions of IATSE and IATSE Local 890 (the wardrobe attendants local union in Ottawa). From these constitutions the dressing staff derived a constitution which was applicable to their situation. A committee of the dressing staff completed a draft constitution which was presented to a general meeting of the membership on September 29, 1984. The draft constitution was read through clause by clause. There was then a question and answer period and the constitution of the applicant was adopted by a vote. The next meeting was held on October 5, 1984, when formal elections were held and an executive was elected. This meeting was attended by all of the members of the applicant, that is to say, all of the charter members of the applicant. Membership cards were issued to the charter members of the applicant and confirmed at the meeting on October 5, 1984, pursuant to the constitution.

6. Article 3, section 2 of the constitution provides that any person applying for member-

ship, unless waived by the International for proper cause upon application by the local, must have been a resident for at least eighteen months preceding her application within its jurisdiction. The evidence before the Board established that the jurisdiction of the applicant is the City of Stratford and that the residency requirements have been and will continue to be waived by the applicant. The evidence also established that there is an established practice of admitting persons to membership without regard to such a provision in the constitution of the applicant within the meaning of section 103(4) of the Act. In these circumstances the Board need not have regard for such eligibility requirements in the constitution. While the constitution of the applicant refers to the female gender, the evidence established that the applicant admits persons to membership regardless of sex and has previously had a male member. The Board finds that the applicant does not discriminate in its membership with respect to sex. The Board further finds that the applicant and its members at its meeting on October 5, 1984, ratified their membership and the election of officers pursuant to the constitution. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the Act.

7. The respondent is presently a party to several agreements with respect to its three theatres in Stratford. There is a collective agreement with Local 220 of the Service Employees International Union which covers "all employees of [the respondent] at Stratford, engaged in maintenance of the buildings and grounds and plant operations, save and except foremen, persons above the rank of foreman and supervisors, office and sales staff, students employed during the school vacation period and employees covered by existing collective agreements between [the respondent] and other trade unions". An agreement between the respondent and the Stratford Musicians' Association, Local 418, of The American Federation of Musicians of the United States and Canada covers 'all musicians engaged by [the respondent] for the purpose of collective bargaining' and further provides that the term musician includes all performers of musical instruments of any kind, or other individuals who render musical services other than composers, vocalists, and individuals speaking as well as performing musical services in a dramatic production. The agreement also contains a form contract for the personal services of musicians. A collective agreement between the respondent and Kitchener Local No. 357 of IATSE covers 'all union personnel employed by [the respondent] in the area of IATSE jurisdiction...[The respondent] further agrees to recognize a stagehand Local formed by the splitting of Local 357 into two Locals'. The jurisdiction of IATSE is set forth in Article III of the collective agreement. Article III provides, in part:

- 3.01 Those employed by the Festival and as supplied by the Union as per Article 2.01 shall perform exclusively all functions necessary to the taking in, setting up, taking down, putting out and changing over as well as the working of all stage presentations and/or dress and technical rehearsals. It is agreed that all construction, installation, operation, alteration and maintenance of stage equipment including, but not limited to scenery, drapes, picture sheets, lighting, sound, projection, special effects created by whatever method, shall be performed by members of the Union. This shall include construction of lighting effects including but not limited to gobos, effects wheels and strobes.

Union members shall also perform all work pertaining to the initial setting of orchestra stands and chairs for dress and technical rehearsals and/or performances, as well as the electrical maintenance as follows:

Festival Theatre

Rehearsal Hall - stage lighting
Auditorium - all dimmed lights
Dressing Rooms - as required

Avon Theatre

Auditorium - all dimmed lights
Dressing Rooms - all lights, including halls and corridors.

The respondent is also bound by an agreement between The Professional Association of Canadian Theatres ("PACT") and Canadian Actors' Equity Association ("CAEA"). In the agreement PACT has agreed to recognize CAEA as the exclusive bargaining representative of "all the Artists engaged by its members for the purpose of collective bargaining and the administration and interpretation on their behalf of matters within the scope of this Agreement and Rules". The agreement further provides that "the term 'Artist' as used in this Agreement and Rules shall include all members of Canadian Actors' Equity Association; Actors; Production Stage Managers; Stage Managers; Assistant Stage Managers; Directors; Choreographers". The respondent is also bound by written agreements which may or may not be collective agreements with the Properties Department Association which covers the painting, welding and upholstery of properties and also between PACT and the Associated Designers of Canada ("ADC") which covers and provides a standard contract with arbitration provisions for designers. An attempt to organize the office and clerical workers was dismissed by the Board in 1984 due to insufficient membership. This outline of the respondent's present collective bargaining relationship indicates that, apart from its maintenance employees, the respondent's bargaining relationships are exclusively with respect to craft bargaining units.

8. The accompanying flow chart (Appendix "A") indicates the lines of supervision and shows the interrelationship between the various areas of the respondent's operations, union jurisdiction and the relationship of the dressing staff to the respondent's organized and unorganized employees.

9. The wardrobe mistresses and wardrobe attendants (dressers) essentially serve the performers. The season commences in late April and ends in October. The other employees who are not represented are concentrated at different times of the year. In the resident cutter column there are approximately eleven cutters and twelve first hands who are assistants to the cutters. There are twelve sewers in teams of four. They work after the material is cut and are called seamstresses and work on the basic items in the wardrobe. They tend to be an older group of skilled employees who work as seamstresses from year to year. They are not present in the same area as the dressing staff and have a different season for their work. The cutters, first hands and sewers generally work from 8:00 a.m. to 5:00 p.m. on Monday to Friday from January until early August and work in a shop on the first floor of the Festival Building. The dressing staff, on the other hand, work at each of the three theatres. The sewers report to the cutters who, in turn, report to the resident cutter. The dressing staff exercise different skills and many of them have come from schools which have theatre programmes. Historically, the dressing staff tend to go on to other areas of the theatre business. The sewers, cutters and first hands tend to work for the respondent year after year and live in the Stratford area.

10. The respondent's job description for wardrobe mistress reads as follows:

POSITION: WARDROBE MISTRESS

FUNCTION:

To organize and maintain in the best possible condition all costumes delivered into her care for productions in the Festival Theatre and to supervise the work of the dressers on her staff.

ORGANIZATIONAL RESPONSIBILITY:

Reports to the Wardrobe Manager.

DUTIES AND RESPONSIBILITIES shall include but not be limited to the following:

- 1) To review the Costume Plot with the Assistant Designer or Wardrobe Manager in

order to become familiar with each costume that each artist is to wear, to identify and plan for quick changes, and to specify maintenance requirements.

- 2) To familiarize herself with the costumes being prepared for each production prior to the dress rehearsal and to discuss with cutters any special requirements regarding laundering and general maintenance for individual shows. To attend rehearsal if necessary to understand particular requirements.
- 3) To assist the designers and Wardrobe Manager in the preparation, organization and execution of photo calls and dress rehearsals.
- 4) To supervise the preparation of appropriate quick change facilities.
- 5) To discuss with the Wardrobe Manager the number and assignment of dressers; to inform dressers of theatre rules and policies related to backstage discipline and conduct with the artists; to ensure that dressers understand and adhere to costume plots, dresser sheets and other appropriate information; to train all dressers in the proper care and maintenance of the costumes; to act as head dresser during performances.
- 6) To be responsible for the repair, maintenance, cleaning, laundering, upkeep and organization of all costumes through the run of the production; to uphold high standards to the satisfaction of the Wardrobe Manager and Head of Design in keeping the production looking fresh and in the condition in which she received it.
- 7) To maintain dresser timesheets and be responsible for delivering these to the Wardrobe Manager.
- 8) To be present at all performances and dress rehearsals, as agreed with the Wardrobe Manager, at the hour prior to curtain and continuously through the performance until all dressers have finished their work period.
- 9) To supervise the closing of productions at the Festival Theatre and to help co-ordinate the storage of costumes and accessories for said productions.

The job of dresser consists of assisting performers in putting on and taking off costumes. They are involved in running maintenance and repairs of costumes. The key skill is the ability to work compatibly with the actors and to be familiar with the performance and the costume plot. While most of the dressers are females, from time to time there are male dressers and some actors request a male dresser. The dressers are distributed among the three theatres with eight at the Festival Theatre, eight at the Avon Theatre and two at the Third Stage Theatre. The average length of work for the dressing staff is about five hours for each performance. In a typical week there might be a combination of five evenings and two matinee performances. There is one wardrobe mistress for each theatre. While the primary interaction is with the actors, there is some incidental interaction with the crew who put on the performance. There is no promotion path *per se* and there is no real interchange with the other classifications on the flow chart. The dressing staff tend to be a self-contained group. While none of the present dressers are in this category, some dressers have moved into areas of interest in stage management and others have entered teaching or become actors, actresses and writers. The wardrobe mistress may be thought of as generally equivalent to a lead hand in that she gives directions and apportions work to the dressers. In addition, the wardrobe mistress selects and matches dressers with actors and actresses.

11. The dressing staff are paid on an hourly basis with overtime after forty hours each week. They receive the minimum statutory benefits plus half of OHIP after ninety days. They receive hourly rates between \$5.50 and \$6.25, while seamstresses receive hourly rates between \$6.00 and \$8.00 per hour. The first level of management is the head of wardrobe who would be

excluded from the proposed bargaining unit. The wardrobe mistress exercises functions analogous to a lead hand and is included in the proposed bargaining unit.

12. It is helpful to compare the work of the employees in the proposed bargaining unit with the work performed by the respondent's employees in the areas indicated on the flow chart under the headings entitled "Millinery", "Resident Cutter", "Prop Builder" and "Wig Builders and Maintenance".

13. The employees who work under the heading of millinery possess very specific skills in producing a costume. The millinery section works on hats. The jewellery section works on stage jewellery, spectacles and watches. The dyer is the first person to work on fabrics which have been purchased for costumes. The dyer changes the colour of the fabric to the designer's specifications. The painters and breakdown section make very specific additions of patterns to fabric and also add sweat marks and dirt to give costumes a lived in look. The boots and shoes section modifies footwear for actors and is responsible for gloves, gauntlets, belts and weapons' carriers. The decoration section makes surface additions to the costume. This may involve embroidery, sequins, fringes and items of a similar nature. The work of this section commences in early December, which is about a month and a half before the actors start rehearsals, and continues until the opening of the last production. Historically, the last production opens in early August. The majority of the productions open in late May and June. Thereafter there is a reduction in staff commensurate with the opening of later productions. The employees in these sections work eight hours a day from Monday to Friday, and, depending on the point in the process, there may be overtime on Saturdays and Sundays. They are located on the first floor of the Festival Theatre in adjacent suites of rooms joined by corridors and are in the same location as the sewers. While the employees in the millinery section report to the head of wardrobe, they are given specific directions by the designers of production. These employees have the opportunity for continuity of employment from year to year subject only to their interest and availability. There is very little opportunity for interchange for relief work or for promotion in these categories. The employees work in their craft and wish to be recognized for their craft. The lead person in each category is on a guaranteed salary.

14. In the area of work headed by the resident cutter, the cutters draft patterns and choose fabric weights after interpreting sketches by the designers. There are usually three fittings for each costume which an actor wears. The cutter is closely involved with the fitting of each costume. The first hand is the most experienced sewer and works under the cutters' direction. The first hands in turn lead the sewers in the sewing of the costumes. It is possible, depending on initiative and interest, to progress from sewer to first hand to cutter.

15. The employees who are engaged as wig builders and in wig maintenance are under the supervision of the heads of wigs. The head of wigs at the Festival Theater works there and is paid on an annual basis. The head of wigs at the Avon Theatre works there and is employed on a seasonal basis. The persons engaged in wig building and wig maintenance start in January of each year about a month prior to the commencement of rehearsals. They are engaged in the creation of new and the modification of existing wigs, facial hair and special requirements for prosthesis and contours of the face. The wigs are made with a specific actor in mind and are made from lace and human hair. The wig maintainer is in attendance on the actor at virtually the same time as the dresser and maintains the wig and assists the actor in affixing and removing the wig and with the accompanying application and removal of the spirit gum. There are a total of five employees in this section. These employees continue with their work until the final performances in mid-November and their total annual employment is about ten months. They are physically located adjacent to the dressing rooms in the Festival Theatre and on the second floor at the Avon Theatre. The three persons engaged in wig building and maintenance are salaried. They receive dress rehearsal and open-

ing week bonuses because these are times of long hours and stress. Their salaries range between \$250.00 and \$600.00 a week and they normally work from 9:00 a.m. to 6:00 p.m. in the pre-season. However, once the dress rehearsals and performances start, they are in the theatres two to four hours daily before the performance commences in order to work on wig maintenance. In the case of productions which are in rehearsal and open later in the season, the wig builder will rebuild and maintain wigs.

16. The employees who work under the heading of prop builders constitute a group of employees numbering between twelve and fifteen, depending on the time of year. They commence work in the beginning of January and their numbers fluctuate until late July or early August at the time of the last opening performance when their employment ceases for the season. They normally work from 8:00 a.m. to 5:00 p.m. from Monday to Friday, receive a guaranteed salary based upon an hourly rate and also receive overtime after forty hours each week. They have their shop on the ground floor of the Festival Theatre and report to the head of props. Their work consists of constructing virtually all movable properties, including scenery, fibreglass armour, household furnishings and draperies. The stage carpenters make the furniture and architecture and the prop builders paint or stain it. The prop buyer purchases materials and items for the property department under the supervision of the heads of props. The prop buyer works the same period of time as the prop builders. The prop builders function as an informal bargaining unit and elect a spokesman who negotiates with the production manager Miss Blake for rates of pay.

17. Across Canada five theatres have a standard agreement with CAEA together with a separate engagement contract with each actor. In the larger centres such as Vancouver, Edmonton and Toronto, producing theatres have collective agreements with IATSE covering stagehands. Travelling crews may work locally and require permission from the International Union in New York to work on travelling productions. In order to work on a travelling production a member must have been a member of the local trade union at the point of origin for two years. The member is engaged by the producer on a contract written on pink paper which stipulates the dates on which commencement and final dates for the work. The contract spells out the salary to be received, the per diem expenses and various other conditions of employment. The contract must be carried at all times and produced if asked. The head carpenter on the touring attraction at the point of origin and the business agent of the local at the point of origin determine the size of the travelling crew and the number of men required to unload, move into the theatre and set up the scenery, lights and other properties within a given time span. The head carpenter and the business agent also determine the number of persons required to operate the equipment on stage. The latter group is generally smaller than the first group. All of this information is recorded and transmitted on a yellow card to each business agent at each location where the touring attraction is to perform. In each case, the requirement for wardrobe mistress/dresser is listed on the yellow card. The supply and availability of wardrobe mistress/dressers varies across the country. In Vancouver the standard collective agreement of IATSE Local 118 covers stagehands and 'head wardrobe' and 'dressers'. In Saskatoon there is not a separate local for wardrobe mistress/dressers and, if requested, the local business agent will do his best to supply wardrobe mistress/dressers.

18. Theatres may generally be divided into those which produce shows and those theatres which provide a place for presenting shows which have originated at another theatre. Such theatres are known as producing theatres and presenting theatres, respectively. Some theatres may be both producing and presenting theatres. In Winnipeg the Manitoba Theatre Centre is a producing and presenting facility and has a collective agreement with an IATSE local union which covers both stagehands and wardrobe mistress/dressers. Other presenting facilities in Winnipeg operate under similar circumstances. In London the Grand Theatre is a producing and presenting theatre and a party to a collective agreement with IATSE Local 105 covering stagehands and not covering war-

drobe mistress/dressers. On the other hand, a collective agreement between IATSE Local 105 and Centennial Hall includes the category "wardrobe". When touring shows perform in London, IATSE Local 105 will respond to the requirements of the touring shows and provide wardrobe mistress/dressers. The Shaw Festival at Niagara-on-the-Lake has a collective agreement with the IATSE Local 461 in St. Catharines for stagehands. "Wardrobe" is specifically excluded from that collective agreement. In Hamilton there is a presenting facility known as Hamilton Place where the stagehands are covered by a collective agreement with IATSE Local 129 which includes the categories of "wardrobe mistress/master, assistant wardrobe mistress/master and dresser".

19. At the National Arts Centre Corporation in Ottawa, IATSE Local 890 has a collective agreement with that corporation which covers "all persons supplied by the union to work as wardrobe attendants and wardrobe mistresses in the wardrobe department". The classifications covered by this collective agreement are wardrobe mistress (master), wardrobe attendant, apprentice member and permit worker and appears to cover nine employees. There are nineteen members in that local union. In Montreal, IATSE Local 863 has collective agreements with La Place des Arts and the Forum "pour les purposes aux costumes" and "pour tous les habilleu(ses)rs", respectively. In Toronto, IATSE Theatrical Wardrobe Attendants Union, Local 822 has collective agreements with Maple Leaf Gardens and the Board of Management of The O'Keefe Centre for "all wardrobe employees". These collective agreements cover wardrobe head, assistant wardrobe head and dressers. In Charlottetown, the IATSE Local trade union is a mixed local and provides stagehands and wardrobe mistress/dressers under one collective agreement. In St. John's and Cornerbrook in Newfoundland, the two IATSE local unions are mixed locals and will provide wardrobe attendants/dressers on an *ad hoc* basis when requested.

20. In Halifax, Dalhousie University is a major presenter of productions. There is not a collective agreement between the University and IATSE. However, the University honours the yellow card formula, referred to earlier, and there is co-operation between the IATSE local union in Halifax and the University's staff. The local trade union supplies a union stagehand and within its ability provides the requirements set forth in the yellow card. The staff of the University operates the University's equipment. The Neptune Theatre in Halifax does not have a working agreement with the Halifax local union of IATSE. In Fredericton, the producing theatre there does not have a collective agreement with the mixed IATSE local trade union which does, however, service touring companies.

21. The situation in the United States mirrors and magnifies the situation in Canada with wardrobe mistress/dressers being represented in mixed locals, or, where members and interest warrant, separate local unions have been established. While most of IATSE's local unions are for projectionists and stage employees, IATSE has extended its jurisdiction beyond stage employees and moving picture projectionists. IATSE has, since its establishment in 1893, moved beyond the jurisdiction described in its name to include specialized locals such as the theatrical wardrobe local. In addition, the chartered locals of IATSE cover specialized locals such as publicists; motion picture studio cartoonists; script supervisors; and story analysts on the one hand to ball park ticket sellers; admissions and mutual ticket sellers; back room and film exchange employees; and first aid employees on the other hand.

22. From 1942 to the present, the following theatrical wardrobe unions have been chartered by IATSE:

719 Denver
747 Columbus
764 New York
768 Los Angeles

769 Chicago
 772 Washington
 775 Boston
 777 Milwaukee
 781 Minneapolis - St. Paul
 783 Buffalo
 784 San Francisco
 786 Detroit
 787 Pittsburgh
 799 Philadelphia
 803 Dallas
 805 St. Louis
 810 Kansas City
 822 Toronto
 825 Memphis
 830 Providence
 831 Omaha
 840 New Orleans
 853 Miami
 858 Rochester
 859 Atlanta
 863 Montreal
 864 Cincinnati
 869 Albuquerque
 874 Sacramento
 875 Phoenix
 883 Cleveland
 886 Daytona
 887 Seattle
 890 Ottawa
 893 Indianapolis - Bloomington
 894 Knoxville
 895 Atlantic City
 896 Houston
 897 Louisville
 899 Jacksonville
 904 Tulsa
 905 San Diego
 908 Red Bank - Freehold
 910 Norfolk
 912 Akron - Canton
 913 Baltimore
 915 Nashville
 924 Stratford.

23. The applicant is seeking certification with respect to a craft bargaining unit. The circumstances under which craft bargaining units are deemed to be appropriate are set forth in section 6(3) which states:

Any group of employees who exercise technical skills or who are members of a craft by reason of which they are distinguishable from the other employees and commonly bargain separately

and apart from other employees through a trade union that according to established trade union practice pertains to such skills or crafts shall be deemed by the Board to be a unit appropriate for collective bargaining if the application is made by a trade union pertaining to such skills or craft, and the Board may include in such unit persons who according to established trade union practice are commonly associated in their work and bargaining with such group, but the Board shall not be required to apply this subsection where the group of employees is included in a bargaining unit represented by another bargaining agent at the time the application is made.

There are three conditions to be met in order for the craft bargaining unit to be appropriate. As the Board stated in *Art Wire & Iron Co. Ltd.*, 54 CLLC ¶ 17,080, each of the following conditions has to be satisfied:

- (1) the group of employees concerned exercise technical skills or are members of a craft by reason of which they are distinguishable from other employees;
- (2) the group of employees concerned commonly bargain separately and apart from the other employees through a trade union that, according to established trade union practice, pertains to such skills or craft; and
- (3) the application for certification is made by a trade union pertaining to such skills.

24. The employees who are affected by this application exercise technical skills and are members of a craft which distinguishes them from other employees. They are required to have a knowledge of the productions which are being performed and to work closely with the actors. They are responsible for the handling and repairing of a considerable number of costumes and are required to have the skill to make repairs on these costumes. Their skills are quite different from the skills exercised by those employees who work in the millinery, cutting and sewing and prop building, and wig builders and maintenance sections of the respondent's operations. The employees who are affected by this application are physically separated from these other employees and are employed for different periods of the production year. There was no evidence before the Board that the employees who work in the millinery, cutting and sewing and wig building and repair sections are represented in collective bargaining in Canada or the United States. The nature of the technical skills of the employees affected by this application may not be strikingly apparent. The skills exercised by dressing staff are subtle and, as yet, there are no formal apprenticeship requirements. The Board commented on the nature and significance of the technical skills exercised by employees in *Harbourfront Corporation*, [1982] OLRB Rep. Nov. 1624 and stated at page 1634:

...the board has often stated that the nature of the technical skills exercised, while an important factor, is not the governing factor, and, that the extent or degree of exercise of the technical skills is not determinative, provided such technical skills are sufficiently used to distinguish the jobs from others. See *Cooper and Beatty Limited*, 58 CLLC ¶ 18,100; and *Commercial Papers Limited*, [1969] OLRB Rep. Nov. 939.

A formal apprenticeship programme is usually associated with a craft. However, the absence of a formal apprenticeship programme has never been fatal to the recognition of a craft bargaining unit by this Board. This is the situation with respect to hotel beverage room waiters, bartenders and tapmen which is a craft bargaining unit recognized by the Board.

25. In *Kidd Creek Mines Ltd.*, [1984] OLRB Rep. March 481, the Board determined that a proposed bargaining unit of maintenance electricians in a mining/industrial facility was not a craft bargaining unit within the meaning of section 6(3). The Board specifically stated that a local trade union of the International Brotherhood of Electrical Workers had not met the second condition set forth in section 6(3). In the instant application, and unlike the situation in *Kidd Creek Mines Ltd.*, the Board is being asked to formally recognize a craft bargaining unit that has been in existence for

more than forty years. The Board is not being asked to create a craft bargaining unit where none has previously existed. The Board notes that the instant application for certification arises within the entertainment industry which has historically been, and continues to be, organized according to craft. This in turn has led to the evolution of craft bargaining units which have usually been the outgrowth of voluntary recognition.

26. There is evidence before the Board that wardrobe mistress/dressers may be unorganized, represented as part of a larger bargaining unit or represented separately by a theatrical wardrobe attendants' local trade union chartered by IATSE. There are now four theatrical wardrobe attendants local trade unions in Canada and three of those four local trade unions have five collective agreements. There are considerably more theatrical wardrobe attendants local trade unions in the United States with a correspondingly greater number of collective agreements. The opportunities for seasonal employment for wardrobe mistress/dressers are limited in Canada to the cities which support producing companies. Producing companies obtain wardrobe mistress/dressers from the local trade unions when such employees are available through the use of the yellow card system. It appears that the degree of organization of wardrobe mistress/dressers and their separateness in their own bargaining units is a function of their numbers and continuity of employment in one location. There are a comparatively small number of wardrobe mistress/dressers in Canada. For example, the Stratford, which is by far the largest producing theatre in Canada, had in 1985 some 450,000 paid admissions and employed a maximum of twenty wardrobe mistress/dressers. Where numbers permit, wardrobe mistress/dressers commonly bargain separately (though not exclusively) through a trade union that, according to established trade union practice, pertains to the skills or craft of wardrobe mistress/dresser. This application has also been made by a chartered local trade union of IATSE which pertains to the skills of wardrobe mistress/dressers. The Board finds that the three conditions referred to in section 6(3) have been satisfied.

27. Having regard to the foregoing and pursuant to section 6(3) of the Act, the Board finds that all theatrical wardrobe mistresses/masters and wardrobe attendants/dressers in the employ of the respondent in Stratford, save and except head of wardrobe and persons above the rank of head of wardrobe, constitute a unit of employees of the respondent appropriate for collective bargaining.

28. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on September 30, 1985, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

29. A certificate will issue to the applicant.

1484-85-R United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, Applicant, v. **Superior Plumbing & Heating Company Ltd.**, Respondent, v. Group of Employees, Objectors

Bargaining Unit - Certification - Construction Industry - Respondent requesting that “gas fitters” be referred to in bargaining unit description - Designation orders not explicitly referring to gas fitters - Board declining to describe a bargaining unit so as to give an affiliated bargaining agent the right to represent employees in trades other than those covered in the designation orders - Not necessary to determine whether gas fitting part of plumbing and steamfitting trades

BEFORE: *Robert J. Herman*, Vice-Chairman and Board Members *J. P. Wilson* and *H. Kobryn*.

APPEARANCES: *A. J. Ahee* and *V. McNeil* on behalf of the applicant; *G. Grossman* and *R. Hogle* on behalf of the respondent; *Rejean St. Martin* on behalf of the objectors.

DECISION OF THE BOARD; November 26, 1986

1. This is an application for certification made pursuant to the construction industry provisions of the *Labour Relations Act*.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on April 12, 1978, the designated employee bargaining agency is the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and the Ontario Pipe Trades Council of the United Association (hereinafter, the “E.B.A.”), and Local 46 is designated an affiliated bargaining agent (the “A.B.A.”), in the same designation order.

3. The bargaining units sought by the applicant consist of all certified plumbers, plumbers’ apprentices, and all certified steamfitters, steamfitters’ apprentices and welders in the employ of the respondent in the industrial, commercial and institutional (“I.C.I.”) sector of the construction industry of the Province of Ontario, and all certified plumbers, plumbers’ apprentices, and all certified steamfitters, steamfitters’ apprentices, and welders in the employ of the respondent in all other sectors of the construction industry in Board Area #8 (i.e., the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham). Although the specific wording of the description of these units is not consistent with the bargaining unit description traditionally given to plumbers and steamfitters, consideration of the specific language used to describe the bargaining unit has been deferred to a later date. According to the schedules filed by the respondent employer, as of the application date the respondent employed a number of plumbers, steamfitters (and their respective apprentices), welders, and employees described by the respondent as “gas fitters”. On community of interest grounds, the respondent asks that the bargaining unit be described so as to include “gas fitters”, along with those classifications requested by the applicant. The respondent submits that the “gas fitters” work goes hand in hand with the plumbers, steamfitters and welders on the respondent’s projects, both in the I.C.I. and other sectors, and thus should be included in the bargaining unit. The applicant, while opposing the respondent’s request that “gas fitters” be expressly referred to in the bargaining unit description (and therefore

included for purposes of the “count”), claims gas fitting work for its members, on the basis that gas fitting is part of its members’ trade. The Board must determine the appropriate bargaining unit, and whether “gas fitters” should be referred to in the description, and whatever bargaining unit is determined as appropriate, which employees fall within that unit.

4. During six days of hearing, the Board heard the evidence and submissions of the parties with respect to whether the appropriate bargaining unit ought to refer to “gas fitters” and whether gas fitting work belonged to the plumbers and steamfitters. While we do not propose to specifically refer to the evidence of each witness, two comments are in order. First, the evidence placed before the Board dealing with community of interest was somewhat limited with respect to how work on particular projects was performed, and with respect to how plumbers and steamfitters interacted with those with gas fitting tickets on ICI or other sector gas related projects. The evidence was understandably sketchy in this regard as neither party called to testify a plumber or steamfitter who had worked for the respondent nor (with one exception) was an employee with a gas fitting ticket called upon to testify. The one exception occurred when the respondent did call the current branch manager from the Cornwall office, who had a gas fitting ticket at the application date; however, the evidence established that there were no plumbers or steamfitters with gas fitting tickets at the Cornwall office as of the application date. The Board was therefore left with second-hand, limited evidence with respect to the work actually being done on the projects in question, and the interaction between those with gas fitting tickets and plumbers and steamfitters. Second, the Board found most witnesses to be credible and forthright in their evidence, and not in any substantial dispute with respect to the matters in issue. The exception was Sean O’Ryan, a member of Local 46 and its business manager, who was called as a witness on behalf of the applicant. Throughout his cross-examination, Mr. O’Ryan was evasive, non-responsive, argumentative (to the point where many of his responses began with “well [counsel’s name], we could of course debate that matter, but...”) and clearly tried to avoid giving any answer which he did not feel was beneficial to the applicant’s case. On several occasions the Board requested or directed that the witness respond to the questions as asked, but to little avail. In the Board’s opinion Mr. O’Ryan’s testimony cannot reasonably be construed as reliable evidence, but rather as Mr. O’Ryan giving his view of what the Board ought to find, and we accordingly assign little weight to it.

5. The respondent is engaged in the installation of plumbing, piping and heating systems in both the I.C.I. and other sectors of the construction industry and operates out of offices in Oshawa, Cobourg, and Cornwall, Ontario. Under the Gas Utilization Code, Ontario Regulation 826/82, a Regulation made under the *Energy Act*, an individual with a gas fitting ticket or certificate must install, or be present during installation, and certify certain types of gas piping, inter alia, and is responsible for various other matters specified therein. There are different levels of gas fitting tickets with different qualifications, met for example by working for a specified number of hours on particular types of projects. In order to obtain any of the gas fitting tickets, an individual need not be a member of any trade or craft, and need not be certified pursuant to the *Apprenticeship and Tradesmen’s Qualification Act*; an individual requires only a certificate or ticket obtained by successfully writing a government administered exam. Individuals can legally perform gas fitting work without belonging to any of the recognized construction industry trades and without necessarily having all the skills those trades demand. Gas fitting is a type of work, and on the evidence the performance of such work falls far short of its own “trade” or “craft” status.

6. The respondent had employees possessing gas fitting tickets in 3 categories: members of the United Association who had gas fitting tickets, members of other trades (eg. sheet metal workers and electricians) who had gas fitting tickets, and four employees who only had gas fitting tickets. Employees in all 3 categories were legally performing gas fitting work, as required by the *Energy Act* and the Gas Utilization Code, and on construction in both the ICI and other sectors.

Those individuals who only had gas fitting tickets received approximately the same pay and worked under the same terms and conditions of employment as did the plumbers and steamfitters with gas fitting tickets. Both parties maintained that the gas fitting work was an integral part of the gas projects performed by the respondent, the applicant suggesting that this factor justified gas fitting work being given to the plumbers and steamfitters, and the respondent maintaining that this factor suggested that 'gas fitters' ought to be included in the description of the appropriate bargaining unit in the ICI sector.

7. This case purports to raise an issue not previously canvassed by the Board. Prior decisions on point considering the appropriate bargaining unit description in the ICI province-wide sector have involved applications by employee or affiliated bargaining agencies to represent employees who performed trades or crafts which their own designation orders did not assign to them, but which trades or crafts were assigned to different employee or affiliated bargaining agents by their respective designation orders. We refer here to such trades or crafts being "assigned to" the employee or affiliated bargaining agencies in the designations, because those designations not only list the bargaining agencies, thereby establishing a bargaining structure for the province-wide scheme, but they also establish who such agents may represent in the scheme, by listing specific trades in the designation. The applicable designation for the E.B.A. and A.B.A. before us in this proceeding designates them "to represent in bargaining all journeymen and apprentice plumbers and pipefitters". Unlike prior cases concerning this sector where *applicants* asked the Board to allow them to represent "trades" that the designations gave to other employee and affiliated bargaining agents, we are asked by this *respondent* to give to the applicant "work" (we intentionally do not refer to it as a "trade" or "craft") which is not expressly covered by *any* of the designation orders. Whether "gas fitting" is a trade or craft is not a question we must decide in order to determine the description of the appropriate bargaining unit, for the reasons given below. The parties' characterization of the issue, as revolving around whether "gas fitters" ought to be included within the bargaining unit, partially prejudices the question. To describe people performing gas fitting work as "gas fitters" suggests that a trade or craft of "gas fitting" exists, whereas, as we noted in paragraphs 5 and 6, *supra*, gas fitting is a type of work individuals perform regardless of whether they otherwise work at a trade or have a trade ticket.

8. With this background, we turn to the submissions of the parties. Counsel for the applicant submitted that, as the applicant had requested its historically described bargaining unit, the Board ought to and must find that that bargaining unit is appropriate. Within that bargaining unit, gas fitting work would fall, as it was part of the applicant's trade. Counsel pointed to a history of the United Association bargaining on behalf of "gas fitters" performing work in the ICI, and at least one other sector, together with the evidence led which established that some plumbers and steamfitters had gas fitting tickets and were performing gas fitting work on the projects in question. Gas fitting was not, therefore, a separate trade or craft, but was part of the plumbing or steamfitting trade. In counsel's submission, section 144(1) of the Act, and Board jurisprudence considering this subsection, specifically *Clarence H. Graham Construction Limited*, [1981] OLRB Rep. Sept. 1195, (discussed *infra*), compelled the Board to find that the traditional bargaining unit requested by the applicant for the ICI sector was appropriate. To find otherwise would be to include employees in the bargaining unit who were not covered by the provincial agreement and who thus would be outside the provincial scheme. The Board was in effect being asked by the respondent to change the entire bargaining unit structure and bargaining relationships within the ICI sector, and in the applicant's submission it was neither appropriate for nor open to the Board to do so.

9. Counsel for the respondent asserted that individuals with gas fitting tickets were needed to legally perform the work in question, and to complete the projects of the respondent, and were therefore an integral part of the plumbing and steamfitting gas projects. Counsel submitted that

the four individuals who had only gas fitting tickets were working legally in performing gas fitting work, spent approximately ninety-five per cent of their time performing such work, and were legally so working whether or not they were members of the United Association. The nature of the respondent's business and the projects on which these "gas fitters" worked, the marked similarity between their terms and conditions of employment and those of the plumbers and steamfitters employed by the respondent, and the fact that the applicant was claiming gas fitting work for its members, all indicated that there was a community of interest between those "gas fitters" and the plumbers and steamfitters, with or without gas fitting tickets, and therefore the Board ought to find that the appropriate bargaining unit description include reference to "gas fitters". With respect to section 144(1) of the Act, counsel submitted that gas fitting is specifically covered in the United Association constitution, and the province-wide ICI agreement also encompasses gas fitting by its reference in Article 1.08 to "pipefitter". Accordingly, even if counsel for the union was correct in his submissions with respect to the meaning and effect of the *Clarence H. Graham* case (*supra*), there is no impediment in the instant case in including "gas fitters" in the unit, as they are covered by the provincial agreement and therefore would be employees covered by the province-wide scheme of bargaining. Alternatively, if the Board finds that the word "pipefitter" in the provincial agreement does not encompass "gas fitters", counsel submitted that the Board must consider section 6(3) of the Act, dealing with craft unions, even though this certification application was made pursuant to section 144(1) of the Act. As new crafts or trades develop in the technologically changing construction industry, the Board must be able to accommodate employees who are performing these new crafts or trades within the province-wide scheme of bargaining. The evidence ought to lead the Board to conclude that gas fitting is a trade or craft, and therefore ought properly to be included within the appropriate bargaining unit (although why such a finding would yield this conclusion was not made clear). Counsel distinguished *Clarence H. Graham*, (*supra*) on the grounds that that case dealt with a multi-trade situation, where there was a contest over the entitlement of one trade to represent, in the ICI, members of a trade designated to be and ordinarily represented by a different trade union. In the instant proceeding, "gas fitters" are not represented by any of the designated trade unions, they are working legally, and therefore the issue is quite different. Finally, counsel submitted that were the Board to accede to the applicant's request, the respondent would be forced to terminate the four "gas fitters" who had legally been performing their work, or alternatively, the respondent would be left in a position of having unionized employees (those represented by the A.B.A. if the applicant is successful in this application) working along side with unrepresented employees (the four individuals who only have gas fitting tickets) and that either scenario would be destructive of sound labour relations.

10. The applicant in this proceeding is an affiliated bargaining agent as defined by the Act, and seeks to represent a group of employees in the ICI sector. Section 144 of the Act reads as follows:

(1) An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (3) or by voluntary recognition.

(2) If on the taking of a representation vote more than 50 per cent of the ballots cast are in

favour of the trade unions on whose behalf the application is brought, or, if the Board is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade unions on whose behalf the application is brought, the Board shall certify the trade unions as the bargaining agent of the employees in the bargaining unit and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

(3) Notwithstanding subsection 119(1), a trade union represented by an employee bargaining agency may bring an application for certification in relation to a unit of employees employed in all sectors of a geographic area other than the industrial, commercial and institutional sector and the unit shall be deemed to be a unit of employees appropriate for collective bargaining.

(4) A voluntary recognition agreement in so far as it relates to the industrial, commercial and institutional sector of the construction industry shall be between an employer on the one hand and either,

- (a) an employee bargaining agency;
- (b) one or more affiliated bargaining agents represented by an employee bargaining agency; or
- (c) a council of trade unions on behalf of one or more affiliated bargaining agents affiliated with the council of trade unions,

on the other hand, and shall be deemed to be on behalf of all the affiliated bargaining agents of the employee bargaining agency and the defined bargaining unit in the agreement shall include those employees who would be bound by a provincial agreement.

(5) Notwithstanding subsections (1) and (4), a trade union that is not represented by a designated or certified employee bargaining agency may bring an application for certification or enter into a voluntary recognition agreement on its own behalf. R.S.O. 1980, c. 228, s. 144.

11. The effect of section 144 was considered by the Board in *Clarence H. Graham (supra)* and it stated, in part, as follows:

6. ...

An examination of this section shows that applications for certification can be made pursuant to subsections 1, 3 or 5. Both subsections 1 and 3 deal with applications for certification by trade unions covered by the regime of province wide bargaining (subsection 1 deals with applications for all sectors including the industrial, commercial and institutional sector, whereas subsection 3 deals with applications for sectors excluding the industrial, commercial and institutional sector). Subsection 5 deals with applications by "a trade union that is not represented by a designated or certified employee bargaining agency", that is trade unions not under the regime of province wide bargaining. For such trade unions it is clear that they are not affected by subsections 1 through 4, and clearly the Board policies set out in the *Duron* case continue to apply with respect to applications for certification by such trade unions. In light of the foregoing, it is clear that since section [144] deals with both applications for certification by trade unions under the province wide bargaining provisions of the Act, and also those not under the province wide bargaining provisions in the Act it deals with all possible applications for certification in the construction industry. Therefore, there can be no appropriate bargaining unit found under section 6(1) as requested by the applicant outside of section [144].

7. For those unions covered by the regime of province wide bargaining, subsection 1 and subsection 3 of section [144] apply. Subsection 3 applications are brought at the option of the trade union involved and by that subsection they can apply for certification in sectors other than the industrial, commercial and institutional sector (and thus outside the provincial bargaining scheme), and in such cases the appropriate bargaining unit is all sectors other than the industrial, commercial and institutional sector in the appropriate board area. However, where a union covered by the provincial bargaining scheme, wants the application to relate to the industrial,

commercial and institutional sector of the construction industry it must apply under subsection 1.

8. Having regard to the foregoing, it is clear that section [144] deals with both applications for certification by trade unions under the province wide bargaining provisions of the Act, and also those trade unions not under the province wide bargaining provisions of the Act. It deals with all possible applications for certification in the construction industry. It would follow, therefore, that whether the Board makes a finding of an appropriate unit under section 6(1) or section [6(3)] of the Act, that such a finding must be made within the confines of section [144], thus the Board cannot as the applicant suggests find an appropriate unit under section [144] and a separate appropriate unit under section 6(1) outside the purview of section [144]. The Board must first deal with section [144] and apply section 6 in relation to section [144]. This requirement is clearly set out in section [138] which reads as follows:

“138. Where there is a conflict between any provisions in sections 139 to 151 and any provision in sections 5 to 57 and 62 to 136, the provisions in sections 139 to 151 prevail”

9. The language of subsection 1 is quite specific with respect to the instructions given to the Board as to the appropriate bargaining unit,

“The unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one geographic area.”

The term provincial agreement is defined in [137(1)(e)] and reads as follows:

137(1) In this section and in sections [135 and 138 to 151],

- (e) “provincial agreement” means an agreement in writing covering the whole of the Province of Ontario between a designated or accredited employer bargaining agency that represents employers, on the one hand, and a designated or certified employee bargaining agency that represents affiliated bargaining agents, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer bargaining agency, the employers represented by the employer bargaining agency and for whose employees the affiliated bargaining agents hold bargaining rights, the affiliated bargaining agents represented by the employee bargaining agency, or the employees represented by the affiliated bargaining agents and employed in the industrial, commercial and institutional sector of the construction industry referred to in a clause 117(e).

That section deals with the bargaining rights held by “affiliated bargaining agents”. That term is in turn defined by section [137(1)(a)],

“137(1) In this section and in [sections 135 and 138 to 151],

- (a) “*affiliated bargaining agent*” means a bargaining agent that, according to established trade union practice in the construction industry, *represents employees who commonly bargain separately and apart from other employees* and is subordinate or directly related to, or is, a provincial, national or international trade union, and includes an employee bargaining agency.”

[emphasis added]

Thus, those employees who would be covered by a provincial agreement are those represented by the applicant union “who commonly bargain separately and apart from other employees”. In the present case that would be employees falling within the trade of carpenter. Clearly, neither bricklayers nor labourers would be covered by the provincial agreement made on behalf of the

applicant, amongst others, by the designated employee bargaining agency representing the applicant.

10. Insofar as the present application relates to the industrial, commercial and institutional sector of the construction industry, it is clear that those employees described as labourers and bricklayers would be outside the provincial agreement, and therefore, outside the regime of provincial bargaining. However, as noted above, since section [144] deals with all applications for certification in the construction industry, and the applicant is clearly not applying for bricklayers and labourers under subsection 3 and cannot apply under subsection 5, it can only apply for labourers and bricklayers under subsection 1. However, since they would not be covered by the provincial agreement relating to carpenters we are of the view that they would not be appropriate for inclusion in the unit found to be appropriate in the present case.

11. It should be noted that section [144] says "shall include all employees who would be bound by a provincial agreement". Normally this would imply that the Board has the power to include employees other than those covered by the provincial agreement. In the present case, however, this becomes a matter of including in a bargaining unit or series of bargaining units employees covered by the regime of provincial bargaining, together with employees outside the provincial bargaining regime. Clearly, subsection 3 and subsection 5 of section [144] deal with matters relating to employees outside the regime of provincial bargaining and we propose to limit the appropriate unit in this case to only those covered by the regime of provincial bargaining. In so doing we are of the view that this is consistent with the provisions of the Act relating to the provincial bargaining. To certify the applicant in the present case for employees in the industrial, commercial and institutional sector in the construction industry, but outside the scheme of provincial bargaining, would create representation rights for trade unions within that scheme for employees outside the regime of provincial bargaining. Such representation would clearly be disruptive of the overall scheme contemplated in sections [135 and 138 to 151].

...

12. The Board in *Clarence H. Graham*, (*supra*) concluded that the employees in question would fall outside coverage of the provincial agreement, and therefore it declined to find that they were properly included within the appropriate bargaining unit, on the analysis set out above in the quote from that decision. Paragraph 8 therein notes that findings of appropriate units, and consideration of either section 6(1) or what is now section 6(3) of the Act, must be made subject to a finding of the appropriate unit under section 144(1). We agree with and adopt that view. The ICI province-wide scheme of collective bargaining is highly structured and stratified, and the usual factors relevant to a determination of the appropriate bargaining unit have only limited application in this statutory scheme. The concept of "community of interest" may well still apply, but if so, subject to the overriding principles and structure set up by section 144 and by the designation system, a system which designates the agents, and the trades they are entitled to represent, in the ICI province-wide component of the construction industry.

13. Further support for the proposition relied upon in *Clarence H. Graham*, that employees other than those covered by the provincial agreement ought not to be included in the provincial bargaining scheme set up by section 144, can be found in section 146 of the Act, which reads as follows:

146. (1) An employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents.

(2) On and after the 30th day of April, 1978 and subject to sections 139 and 145, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.

...

As noted in *Rolland Duquette Construction*, [1983] OLRB Rep. Nov. 1884, the purpose of section 146 of the Act is to ensure that unions and their umbrella organizations covered by the scheme of provincial bargaining enter only those collective agreements with respect to the ICI sector which are provincial in scope. As section 146(2) makes explicit, it is not open under this scheme for a trade union or the employee bargaining agency to attempt to bargain for or conclude any collective agreement “affecting employees represented by affiliated bargaining agents other than a provincial agreement...”. As noted earlier, the designations explicitly state which trades the employee and affiliated bargaining agents are to represent in bargaining in this sector.

14. Although the earlier cases decided by the Board raise the question of whether the province-wide statutory scheme (and specifically section 144 of the Act) compels the Board to describe appropriate bargaining units only as encompassing trades *covered by the provincial collective agreements*, they have held it unnecessary to decide that question, as the Board felt it was inappropriate in the exercise of its discretion to include employees not so covered by the provincial agreements, whether it was open to it to do so. We agree with those decisions and the manner in which the Board exercised its discretion therein, however, in our view, the statutory scheme does compel the Board to find for purposes of province-wide bargaining in the ICI sector by the affiliated bargaining agents, that the only bargaining unit descriptions that are appropriate are referable to trades or crafts *covered by the applicable designation orders*.

15. In *Manacon Construction* [1983] OLRB Rep. Mar. 408, the Board stated, in part, as follows:

36....Therefore when employees in those trades are represented by an affiliated bargaining agent *that is not designated to represent those trades*, in this case Local 1030 and the millwrights designated employee bargaining agency, those employees would be outside of the provincial bargaining regime. Since they are outside of that regime *and not covered by the millwrights provincial agreement* they are not amongst those employees “...who would be bound by a provincial agreement...” of the millwrights employee bargaining agency. In the result, they would not qualify to be included in the bargaining unit prescribed by section 144(1) of the Act.

[emphasis added]

Pausing for a moment, what is critical in our view is the first emphasized phrase, that those trades would be purportedly represented by an affiliated bargaining agent that the agent would not be designated to represent. This in itself would render such employees outside the regime of provincial bargaining regardless of whether the provincial agreement made reference to such employees or trades. Reference to the definitions of a “provincial agreement” and “affiliated bargaining agent” in section 137 of the Act (set out in paragraph 11, *supra*, in the quote from *Clarence Graham*) and sections 144 and 146 make this clear. The “provincial unit” referred to in section 146(1), and as referred to in the balance of this decision, is comprised of various affiliated bargaining agents and the employee bargaining agency which in turn represents them. If an affiliated bargaining agent attempts to represent, in the province-wide ICI sector, employees not in trades it is designated to represent, it would not be representing them in its capacity as an affiliated bargaining agent bound by the provincial agreement. The provincial agreement is made by the employee bargaining agency, which is designated to represent in the instant case plumbers and pipefitters, not, for example, carpenters or “gas fitters”. *Manacon Construction* makes this point:

37. While the Board has arrived at this result having found that Local 1030 is represented by the millwrights designated employee bargaining agency and, consequently, is a trade union to which subsection 1 through 4 of section 144 apply and is not a trade union to which subsection 5 applies, the Board is of the view that the result would be no different if Local 1030 had been

excluded from representing millwrights and their apprentices in the ICI sector. It would be a trade union that is *not* represented by a designated or certified employee bargaining agency as contemplated by section 144(5), but it would still be an affiliated bargaining agent within the meaning of section 137(1)(a). As an affiliated bargaining agent, it is subject to the strictures of sections 146 of the Act. Subsection 1 of section 146 allows the making of only one Collective Agreement by an employee bargaining agency and an employer bargaining agency for each unit (of affiliated bargaining agents or employers as the case may be) that it represents and that must be the provincial agreement. Subsection 2 makes it an offence for, *inter alia*, an affiliated bargaining agent (without reference to whether represented by an employee bargaining agency and so affecting all affiliated bargaining agents) or employee bargaining agency to bargain for, to attempt to bargain for or to conclude any collective agreement or any other arrangement affecting employees in the ICI sector represented by affiliated bargaining agents *other than a provincial agreement*. Since a provincial agreement must be between an employee bargaining agency and an employer bargaining agency, an affiliated bargaining agent cannot make a provincial agreement unless it is also an employee bargaining agency. With that one exception, an affiliated bargaining agent cannot make a provincial agreement and it is prohibited from making any other agreement or arrangement with respect to employees in the ICI sector. Therefore an affiliated bargaining agent that is not an employee bargaining agency cannot make a lawful agreement with respect to employees in the ICI sector. By comparison, the Christian Labour Association of Canada and the National Council of Canadian Labour, trade unions which are eligible to apply under subsection 5 of section 144 of the Act, are not affiliated bargaining agents. Thus when they are certified to represent employees in the ICI sector, they are not subject to the strictures of section 146(2) of the Act.

• • •

As paragraphs 36 and 37 of that decision indicate, an affiliated bargaining agent can only represent employees in the province-wide scheme in the ICI, in trades which the employee bargaining agency and the affiliated bargaining agent are designated to represent. The designations covering the United Association and Local 46 do not explicitly refer to "gas fitters". We return later to the question of whether "gas fitting" can be considered exclusively part of the trades of plumbing or pipefitting.

16. The provisions of section 139 of the Act must also be considered:

139. (1) The Minister may, upon such terms and conditions as the Minister considers appropriate,

(a) designate employee bargaining agencies to represent in bargaining provincial units of affiliated bargaining agents, and describe those provincial units;

(b) notwithstanding an accreditation of an employers' organization as the bargaining agent of employers, designate employer bargaining agencies to represent in bargaining provincial units of employers for whose employees affiliated bargaining agents hold bargaining rights, and describe those provincial units.

(2) Where affiliated bargaining agents that are subordinate or directly related to different provincial, national or international trade unions bargain as a council of trade unions with a single employer bargaining agency for a province-wide collective agreement, the Minister may exclude such bargaining relationships from the designations made under subsection (1), and subsection 146(2) shall not apply to such exclusion.

(3) Where a designation is not made by the Minister of an employee bargaining agency or an employer bargaining agency under subsection (1) within sixty days after the 27th day of October, 1977, the Minister may convene a conference of trade unions, counsels of trade unions, employers and employers' organizations, as the case may be, for the purpose of obtaining recommendations with respect to the making of a designation.

(4) The Minister may refer to the Board any question that arises concerning a designation, or

any terms or conditions therein, and the Board shall report to the Minister its decision on the questions.

(5) Subject to sections 140 and 141, the Minister may alter, revoke or amend any designation from time to time and may make another designation.

(6) The Regulations Act does not apply to a designation made under subsection (1). R.S.O. 1980, c.228, s.139.

Section 139(1)(a) makes clear that it is the Minister, and not the Board in a certification proceeding pursuant to section 144 of Act, who designates employee bargaining agents and who further must "describe those provincial units" of affiliated bargaining agents. It is these "provincial units" which are referred to in section 146(1), in terms mandating that the employee bargaining agency make only one provincial agreement *for each provincial unit that it represents*.

17. For purposes of the instant proceeding, the Minister has designated the U.A. and the Ontario Pipe Trades Council of the U.A. as the employee bargaining agency and Local 46 as an affiliated bargaining agent. Equally important, it is the Minister's function pursuant to this subsection to "describe those provincial units". In other words, the Act gives the Minister the power to describe the appropriate provincial unit with respect to the province-wide scheme set out under various sections of the Act as discussed above. Those designation orders do not merely indicate who the designated agents are, but they designate the trades or crafts that, in a sense, belong to each agent. If particular trades or crafts are not therefore given to employee bargaining agencies or their affiliated bargaining agents by the Minister's designation order, then for purposes of an application pursuant to section 144(1) of the Act, the Board cannot describe a bargaining unit that includes such trades as it cannot determine an appropriate bargaining unit which includes trades or crafts other than as encompassed in the designation orders. If employee bargaining agencies or affiliated bargaining agents in the province-wide scheme want to represent trades or employees performing skills other than they have been assigned in a designation order, they can resort to section 139(5) of the Act which creates the mechanism for amending the designation orders. Alternatively, parties can argue that the performance of the skill or work in question is part of their designated trade or craft, and thus properly falls within the existing trade designation. Although this debate might form the basis of a grievance or a jurisdictional dispute, in this certification proceeding the applicant argues just this proposition. The Board's historical treatment of "welders" in the ICI was raised as a prime example of employees being found to perform the work of a particular trade or craft. For different projects and employers, welders have been found to be working at different trades, and thus could be represented by the different, but appropriately designated, affiliated bargaining agents. In each case it had to be determined whether welders were working at the trade in question. It is important to understand, however, that consideration of that issue may be necessary in a certification proceeding in order to determine which employees were performing the trade in question, and therefore which employees were included in the bargaining unit. An inquiry into the nature of the work being performed by employees is relevant in a certification proceeding to settle the parameters of the bargaining unit. Welders have been found by the Board in certification proceedings to be working at, *inter alia*, the plumbing and steamfitting trade for a particular employer, and they were covered by the provincial agreement. In the instant proceeding it is unnecessary for the Board to consider whether "gas fitting" is part of the plumbing and steamfitting trades, for reasons discussed below. A third alternative mechanism for becoming entitled to represent employees of a trade not given to the agent in the designation, would be through an application pursuant to s.140 of the Act. Which approach might be utilized depends of course on the circumstances of each case.

18. Other cases support our analysis. In *Ninco Construction Ltd.*, [1982] OLRB Rep. Nov. 1692, the Board stated at paragraph 5 therein:

...

5. The contention of the applicant is that in the *Clarence H. Graham* case the Board misinterpreted the relevant provisions of the Act and wrongly concluded that it was prohibited from certifying an affiliated bargaining agent for employees falling outside the scope of the relevant designation. Accordingly, contends the applicant, the Board should not follow the reasoning set forth in that case. *We incline to the view that section 144 of the Act does not permit an affiliated bargaining agent to apply to represent employees in the ICI sector who are outside the scope of the designation affecting it.* However, even assuming that the Act does not actually prohibit such a result, we nevertheless regard the unit being requested here, (namely one which includes employees both within and outside the regime of provincial bargaining such that some but not all of the employees would fall under a provincial agreement) to be disruptive of the scheme of provincial bargaining and not appropriate for collective bargaining. The Board has a broad general authority under section 6(1) of the Act to determine the unit that is appropriate for collective bargaining. In the ICI sector this broad authority is restricted somewhat by section 144. Nothing in section 144, however, mandates that the Board include different crafts or classes of employees within the same bargaining unit or requires that employees within and outside the scheme of provincial bargaining be included in the same unit. Accordingly, even if such a unit is permitted under the Act, nevertheless the Board still retains the authority under section 6(1) to conclude that it is inappropriate. As already indicated, we view the unit being requested in this case as inappropriate. Instead, *we regard the appropriate bargaining unit as one which encompasses only employees covered by the labourers' employee bargaining agency designation* and who, accordingly, would fall under the labourers' provincial agreement.

[emphasis added]

19. The Board reached a similar conclusion in *Loremar Structures Inc.*, [1985] OLRB Rep. Dec. 1747, where the Board stated at paragraph 5 therein:

5. The applicant is seeking to be certified for a bargaining unit of employees that would be comprised of all construction labourers employed by the respondent in the industrial, commercial and institutional (ICI) sector of the construction industry in the Province of Ontario and all construction labourers, carpenters and carpenters' apprentices employed by the respondent in all sectors of the construction industry in the Board's geographic area #15. As stated in paragraph 3 above, the applicant is an affiliated bargaining agent of the designated employee bargaining agency named therein. That agency is designated to represent construction labourers in the ICI sector of the construction industry in the Province of Ontario. It is not designated to represent carpenters and carpenters' apprentices in that sector. Nor is the applicant seeking to be certified for carpenters and carpenters' apprentices in the ICI sector. The problem arises, however, with the requirements of section 144(1) of the Act under which the applicant has brought its application. It prescribes that an application which relates to the ICI sector be described to include all employees who would be bound by a provincial agreement (that is, those employed in the ICI sector) together with all other employees in at least one appropriate geographic area, which in this case would be the Board's geographic area #15. It is well settled law now that, whether or not the requirements of section 144(1) allow the Board to describe a bargaining unit to include trades other than those for which the applicant is designated to bargain in the ICI sector, the Board has found that it would not be appropriate to do so because of the disruptive effect that would have on the scheme of provincial bargaining set out in the Act. In this respect see the Board's decisions in *Clarence H. Graham Construction Ltd.*, [1981] OLRB Rep. Sept. 1195; *Ninco Construction Limited*, [1982] OLRB Rep. Nov. 1692; and *Manacon Construction Limited*, [1983] OLRB Rep. Mar. 407 and July 1104.

20. For the reasons and analysis we have set out above, it is our opinion that we cannot describe a bargaining unit in this sector so as to give an affiliated bargaining agent the right to represent employees in trades other than those covered in the designation orders in question. Again, the trade need not be explicitly or specifically referred to in the designation and description of the

provincial unit, as long as it can be demonstrated that the trade or work not expressly designated is part of a trade which is explicitly assigned. We venture no opinion on whether employees can be included in a bargaining unit under section 144, where the trade or skill in question is covered by the relevant designation order but is not encompassed within the provisions of the provincial agreement. Reference to the designation order makes clear that gas fitting is not covered therein. Accordingly, the Board cannot find that “gas fitters”, so described, can be included in the appropriate bargaining unit as found pursuant to section 144(1) of the Act.

21. In the alternative, if we are wrong in our view that it is not open to us to so find, we would follow the noted cases and their rationale, wherein the Board exercised its discretion to conclude that it would be inappropriate to describe a bargaining unit as to include employees not covered by the provincial agreement. “Gas fitters” (employees who perform gas fitting work) are not employees to whom the ICI agreement in question applies. In our view, the word “pipefitter” in the provincial agreement does not encompass “gas fitters”. Mr. O’Ryan (the applicant’s business manager) testified that “gas fitters” are not included within the term “pipefitters”, and although we give little weight to his evidence, we are left with no evidence supporting such inclusion, other than the word “pipefitter” itself in the provincial agreement. There was no evidence of any instance of “gas fitters” being described as “pipefitters”. Of some assistance in considering whether the word “pipefitter” in the provincial agreement includes “gas fitter”, we note that individuals who only have gas fitting tickets, and who are not otherwise members of the applicant, cannot become members of the applicant for purposes of working in the ICI sector, according to both the United Association constitution and Mr. O’Ryan’s unchallenged evidence to that effect. All these factors together lead us to conclude that “gas fitters” are therefore not covered by the provincial agreement. We would accordingly exercise our discretion to not include “gas fitters” within the appropriate bargaining unit, for to do so would be to include employees not covered by the province-wide scheme with those who are so covered. If the statutory language does not actually preclude inclusion of trades or skills not covered by the designations or the provincial agreements, the structure and intent of that scheme, wherein it divides different trades and crafts amongst different bargaining agents, and assigns to each agent specific trades through the designation orders, suggests that the appropriate description encompasses the designated trades and employees covered by their provincial agreements.

22. The respondent also argued that “gas fitting” is a separate trade or craft, that the application of section 6(3) thus leads the Board to find a unit of “gas fitters” as appropriate, and that community of interest grounds suggest that “gas fitters” ought to be included within the bargaining unit in question. Apart from the observation that section 6(3) deals with “craft” concepts which negate traditional community of interest principles, as noted in *Clarence H. Graham* (*supra*, at 8 of that decision), any finding under section 6(3) must be made within the confines of section 144. Our analysis of section 144 set out above, and the conclusion we have reached thereunder, that it would be inappropriate to include “gas fitters” in the bargaining unit description, illustrates that resort to section 6(3) to so include them would be inconsistent with the exercise of our discretion pursuant to section 144(1) of the Act. The applicant is only entitled to represent, in this sector, employees performing plumbing or steamfitting, *inter alia*, but not gas fitting. In addition to the view that in these circumstances section 6(3) cannot cause the Board to include employees in an ICI bargaining unit who would not be covered by the province-wide scheme of bargaining, as a factual matter we are not satisfied that the evidence established that “gas fitting” is a craft or trade within the meaning of section 6(3). The evidence fell far short of this and suggested the opposite.

23. Finally, the respondent and applicant both asked the Board to deal with the question of whether ‘gas fitting’ is part of the trades of the applicant. The respondent asserts that such a finding would mean that employees performing such work, including those who only have gas fitting

tickets, should be included within the bargaining unit, presumably on the theory that all employees performing work of the plumbing or steamfitting trades should be included within the bargain unit, whether or not they are plumbers or steamfitters. The applicant contends that such a finding, that "gas fitting" is part of their trade, yields the conclusion that the work belongs to plumbers or steamfitters, and those performing such work who are not plumbers or steamfitters, would be doing so improperly once the applicant becomes certified. In the Board's view, we need not and should not answer this question in this certification proceeding. Beyond describing the bargaining unit, as we have above, we ought not to deal with whether certain work is part of the applicant's trades unless necessary in order to determine which employees fall within the described unit (and therefore are to be included for purposes of the "count") and to determine who will therefore be represented by the applicant should it be certified. The resolution of that issue does not revolve around whether "gas fitting" is part of the trade of plumbing or steamfitting, as the parties have suggested, but rather whether the work actually being performed by the employees at the relevant time, presumably on the application date, is plumbing or steamfitting work. Whether there exists work which one could accurately describe as "gas fitting", and whether any such work would be part of the plumbing or steamfitting trade, is of little assistance. We must decide whether employees working for this respondent, at the relevant time, were performing the work of plumbing or steamfitting, not whether something called "gas fitting" is part of those trades. Although we heard lengthy evidence of what work employees perform for this respondent, we are not satisfied that the parties directed their minds and evidence to what work disputed employees performed on the application date, and this matter will be relisted to deal with that issue.

24. Having regard to the above, the Board will find as appropriate a bargaining unit which refers only to plumbers, steamfitters, and welders, and their respective apprentices, but does not refer to 'gas fitters' or gas fitting work, both with respect to the ICI sector and all other sectors in Board Area #8. Specific wording of the appropriate bargaining unit must wait until the parties have had an opportunity to make submissions with respect to the description requested by the applicant in this regard.

25. This matter is referred to the Registrar for relisting for hearing to consider all matters that remain in issue, including those referred to above. This panel is not seized with this matter.

3025-85-M Labourers' International Union of North America, Local 1089, Applicant, v. **Teperman and Sons Inc.**, Respondent

Adjournment - Construction Industry Grievance - Reconsideration - Board finding respondent violated collective agreement and ordering compensation of applicant - Respondent asking for reconsideration and adjournment of reconsideration until jurisdictional dispute proceedings completed - Board declining to defer to jurisdictional dispute process at late stage in proceedings

BEFORE: *Harry Freedman*, Vice-Chairman, and Board Members *I. M. Stamp* and *H. Kobryn*.

APPEARANCES: *David Strang* and *Robert Leone* on behalf of the applicant; *Richard J. Charney* and *Steven Teperman* on behalf of the respondent.

DECISION OF THE BOARD; October 20, 1986

1. At the hearing of this matter before the Board on October 14, 1986, the Board issued the following oral decision:

This grievance arbitration proceeding resulted in a decision dated March 27, 1986 by which the Board determined that the respondent had violated the subcontracting provisions of the collective agreement by which the parties were bound and directed the respondent to "...comply with the collective agreement if it performs or continues to be responsible for the performance of the work after March 24, 1986; [and]...to compensate the applicant for all losses caused for the aforesaid violation of the collective agreement arising on and after February 18, 1986."

Counsel for the respondent requested reconsideration of that decision and submits that we should adjourn the request for reconsideration until related proceedings, initiated after the Board's decision in this matter was issued, are determined.

This matter came back on for hearing in September on the determination of the quantum of damages and was adjourned. See our decision in this matter dated September 22, 1986.

The applicant has commenced section 63 and 1(4) proceedings, an unfair labour practice complaint, and an application to terminate the bargaining rights held by a painters' union in respect of the employees of Best Asbestos. (Best Asbestos was the person to whom the respondent subcontracted the work. It was that subcontract that gave rise to this proceeding.)

The respondent has also filed a complaint under section 91 over the assignment of the work that was the subject of our decision of March 1986.

Counsel for the respondent, in a detailed and comprehensive argument, explained why the request for reconsideration ought to be adjourned and also why the Board should revoke its March decision, or, at the very least, amend the remedial portion of the order contained in that decision. While not attempting to outline his argument in detail, the request for the adjournment and reconsideration rests upon the subsequent filing of the 63 and 1(4) applications and the jurisdictional dispute complaint. Counsel argued that the decision in this matter will be substantially affected by the result in those other proceedings. Counsel submitted that the Board's policy of deferral of grievance arbitration to the jurisdictional dispute process when the grievance raises a jurisdictional issue ought to be followed in this proceeding. Counsel referred us to *B. N. Tile & Terrazzo Co. Ltd.*, [1977] OLRB Rep. April 244; *Napev Construction Limited*, [1979] OLRB Rep. Sept. 886; *Napev Construction Limited*, [1982] OLRB Rep. Jan. 79; *The Corporation of the City of Peterborough*, [1984] OLRB Rep. Dec. 1752; and *Pre-Con Company, A Division of St Marys Cement Limited*, [1981] OLRB Rep. July 947.

The principle of deferral discussed in those cases is sensible. However, that principle has no application in this case at this stage of the proceeding. Here we have already determined the merits of the grievance and remained seized with determining the quantum of damages. All of the cases relied on raise the deferral issue as a matter preliminary to the hearing of the merits of the

grievance. Although counsel for the respondent characterized the grievance that came on for hearing in March as relating to a "latent jurisdictional issue" that did not surface until after our decision on the merits, we do not agree with his characterization. The grievance claimed an improper subcontracting of work and sought to have the work that had been subcontracted performed by members of the applicant. For reasons best known to the respondent, it chose not to even suggest at that hearing that a jurisdictional dispute between the painters' union and the applicant might exist. Rather, the respondent argued the grievance on the ground that the work in dispute was either outside of the scope of the collective agreement or that there was no subcontracting involved. The respondent was unsuccessful. In our opinion, it is not appropriate for us to either adjourn or grant reconsideration on the ground advanced since it was clearly open to the respondent to raise the issue of a jurisdictional dispute at the March hearing.

Furthermore, the only matter that remains unresolved in this proceeding is the calculation of damages. In our view, the applicant ought not to be precluded from having that assessment made. We remained seized of the issue of the quantum of damages when we issued our March decision. We could have determined the quantum issue at that time as well, but did not do so. However, we did at that time direct the respondent to compensate the applicant. In our opinion, the subsequent proceedings initiated by both the applicant and the respondent do not establish a proper basis for reconsideration. We are satisfied that the Board in those proceedings can, if it is advisable for it to do so, deal with the arguments raised by counsel here as to the effect of those proceedings on this decision. Simply because the Board *might*, in those proceedings, determine the merits of the work assignment or whether the respondent and Best Asbestos are one employer under the Act is not a proper basis for denying the applicant the right to proceed with a determination of the quantum of damages. Additionally, speculation about what the ultimate result of those proceedings might be is not a proper basis for either an adjournment or reconsideration.

2. Following the Board's decision in this matter, the applicant called David Solomon, the general manager of Best Asbestos, as its witness to establish the quantum of damages. During the course of Mr. Solomon's examination-in-chief, Mr. Solomon became concerned about answering certain questions that went beyond merely proving how many employees worked for Best Asbestos during the relevant time period and the number of hours that those employees worked. Mr. Solomon requested an adjournment of the hearing in order to consult with counsel. Counsel for the applicant, after some discussion, agreed to Mr. Solomon's request for an adjournment. Counsel for the respondent also agreed to that request.

3. Mr. Solomon, who had been served with a summons to witness by the applicant to secure his attendance before the Board, undertook to return for the next day of hearing in this matter without requiring either the service of another summons to witness or the payment of conduct money in respect of that next day of hearing upon being advised by either counsel for the applicant or counsel for the respondent as to the date of the next day of hearing.

4. Therefore, the Board hereby adjourns this proceeding on the agreement of the parties to allow David Solomon the opportunity to retain and instruct counsel with respect to this proceeding.

5. This matter is referred to the Registrar to be re-listed for hearing before this panel of the Board on a date to be fixed by the Registrar in consultation with counsel for the applicant and counsel for the respondent.

1804-86-R International Union of Operating Engineers, Local 793, Applicant, v. Tricil (Sarnia) Limited, Respondent, v. Group of Employees, Objectors, v. Teamsters, Chauffeurs, Warehousemen and Helpers Local 880, Intervener

Bargaining Unit - Certification - Whether students employed in a co-operative training program for lab technicians should be excluded from full-time unit

BEFORE: Ken Petryshen, Vice-Chairman and Board Members W. G. Donnelly and J. Sarra.

APPEARANCES: Jack J. Slaughter and Bruce Knight for the applicant; Barbara G. Humphrey, Ian Hamilton and Robbin Dawe for the respondent; John Gabriel for the objector; no one appearing on behalf of the intervener.

DECISION OF THE BOARD; November 13, 1986

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. The parties were unable to agree on the bargaining unit description. In the bargaining unit description set out below, the parties are in dispute with respect to the underlined portions:

all employees of the respondent in the Township of Moore, save and except *supervisor*, persons above the rank of *supervisor*, office and sales staff, dispatchers, employees for whom any trade union held bargaining rights as of September 24, 1986, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and *students employed in a co-operative training program*.

4. The applicant contends that the position of supervisor represents the first level of management while counsel for the respondent argues that the first level of management is represented by the chief chemist position. The applicant also takes the position that students employed in a co-operative training program should be excluded. Counsel for the respondent disagrees. With respect to this latter issue, the parties agreed on the material facts and made their submissions to the Board. After entertaining the parties' submissions, the Board reserved its decision. This decision represents the Board's ruling and reasons on the issue of whether students who are employed in a co-operative training program are to be excluded from the bargaining unit in this application.

5. The person who was employed by the respondent in a co-operative training program on the date of the application is Mike Kitchen. Prior to starting with the respondent as a lab technician on December 16, 1985, Kitchen had been in a college program for approximately 1 1/2 years. From December 16, 1985 until the end of April, 1986, Kitchen worked full-time hours for the respondent. For a period of nine weeks in May and June, 1986, Kitchen worked "part-time" hours

which varied from a low of 5 1/2 hours to a high of 37 hours per week. Kitchen resumed working full-time hours for the respondent in July, 1986 and it is expected that he will continue to work full-time hours until the end of December 1986. It is expected, as well, that this pattern of work will continue for Kitchen until he completes the study portion of the program at the end of 1987.

6. There are three lab technicians in the bargaining unit who are not in dispute. All three of these persons were involved in a co-operative training program similar to Kitchen's training program prior to becoming permanent full-time employees. It is expected that Kitchen will also be hired by the respondent as a full-time lab technician once his study program is completed.

7. Kitchen's terms and conditions of employment are similar to those of the other lab technicians, except that Kitchen does not receive a weekly salary, he is not covered by the respondent's benefit plan, he does not receive time off in lieu of overtime and the respondent does not provide him with safety boots. All of the lab technicians essentially perform similar work. On the schedules filed by the respondent, Kitchen is described as a "laboratory technician in training". As one would expect from such a position and as counsel indicated in her argument, Kitchen's duties and responsibilities vary to some degree and he is paid less when compared with the other lab technicians.

8. Counsel for the applicant argued that the Board's practice is to exclude students employed on a co-operative training basis from a full-time unit and that the Board should follow this practice in this case given the circumstances. Counsel submitted that the different terms and conditions of employment of Kitchen, when compared to the other lab technicians, should lead the Board to conclude that Kitchen does not have a community of interest with the full-time permanent employees. Counsel argued that placing Kitchen in the full-time unit may have the effect of depriving the permanent employees of bargaining rights.

9. Counsel for the respondent submitted that the Board's policies of ensuring access to collective bargaining and of defining bargaining units in such a way so as to promote harmonious and meaningful bargaining should lead the Board, on these facts, to include Kitchen with the full-time unit. Counsel suggested that previous Board decisions were of little assistance in this case, and even if the Board's practice is to exclude such a category of employee, such a practice is not carved in stone and each case must be examined in light of its own facts. Counsel emphasized Kitchen's work experience when arguing that he should not be treated by the Board in the same way it treats students employed during the school vacation period. Counsel argued when one looks at Kitchen's terms of employment in comparison with the other lab technicians, one does not find such a diversity so as to lead one to conclude that Kitchen has no community of interest with the other lab employees. By excluding Kitchen from the bargaining, counsel argued, the Board would effectively be depriving him of the opportunity to gain the advantages of collective bargaining.

10. The Board's practice, as revealed by its decisions, has been to consistently exclude students employed in a co-operative training program from a full-time unit. Although there are not many published decisions on point, we are not aware of any decision which has included such a category of employee in a full-time bargaining unit where the issue was in dispute. In *Union Carbide Canada Limited Gas Products*, [1971] OLRB Rep. Aug. 464, after reiterating the Board's policy regarding students employed during the school vacation period, the Board indicated that "we see no reason why such a policy should not likewise be applicable to students employed on a co-operative training basis". Since it is clear that the employer in that case did not employ persons in that category on the date of the application, but had a history of employing such persons, the Board requested further particulars of its expectations of employing such students in the future. In *Lely Limited*, [1971] OLRB Rep. Aug. 539, the Board concluded, having regard to the evidence con-

tained in an examiner's report, that a person in dispute was employed as a student in a co-operative training program and, therefore, excluded from the bargaining unit. The Board noted that it was its regular practice to exclude such persons from a bargaining unit at the request of either party. Although not dealing with the precise issue, subsequent Board decisions have confirmed its practice with respect to students employed in a co-operative training program (see, for example, *Trent Metals Limited*, [1976] OLRB Rep. Dec. 840, and *S.G.S. Supervision Services Inc.*, [1981] OLRB Rep. Oct. 1471).

11. The Board is concerned with attempting to structure bargaining units in a way that will promote collective bargaining. To achieve this objective, the Board will not place employees who have significantly different interests in the same bargaining unit. In addition, when it fashions bargaining units, the Board is concerned with ensuring that access to collective bargaining is not unduly restricted. Based on these policy considerations, the Board has developed a practice of excluding students employed during the school vacation period from a unit of full-time employees. Generally, students do not have a long term commitment to a particular employer and they have terms and conditions of employment which differ in a material way from the terms and conditions of employment of the permanent full-time employees. By placing such a constituency with its distinctive interests in a bargaining unit with the full-time employees, the Board would be creating a potentially unworkable bargaining structure as well as perhaps depriving the full-time employees of their right to collective bargaining.

12. The Board has treated students employed in a co-operative training program in the same way it treats students employed during the school vacation period for essentially the same policy and community of interest considerations. In the Board's view, students employed in a co-operative training program would have interests more akin to those of students generally as opposed to those of the permanent full-time employees.

13. In approaching the issue before us, we accept the position advocated by counsel for the respondent that the Board's practices are not carved in stone. We agree with the following comments in *The Toronto General Hospital*, [1986] OLRB Rep. April 566, wherein the Board stated at page 571:

... we must also say that we are in full agreement with counsel for the Hospital that such practices and policies must always be open to challenge and be capable of being examined fully in the light of each case and each new set of facts that are presented. Otherwise, the Board would be seen to be fettering its discretion and failing to exercise its jurisdiction to determine the appropriate bargaining unit in cases such as this.

14. In examining the facts in the instant case, we are not satisfied that the circumstances before us warrant departing from the Board's usual practice. The fact that Kitchen has worked for the respondent for some time, is expected to work for some time in the future and the respondent expects to hire him as a full-time lab technician, are factors which do favour placing him in the full-time unit. But even though it is expected he may become a permanent employee in the future, his status as of the application date is still that of a person who is studying and working in the hope of qualifying as a registered technician. If Kitchen does not successfully complete his course, presumably he will not secure a permanent position with the respondent as a lab technician. If he does complete the course, he may decide to secure permanent employment elsewhere. Although Kitchen's work experience gives the appearance of an on-going relationship between him and the respondent, there is still an element of uncertainty that characterizes the relationship. It is this element of uncertainty, in part, which places Kitchen in a different position than that of the permanent full-time employees. In one sense, Kitchen is no different from students who work for an employer for many summers and expect to obtain permanent employment once their schooling

is completed. Until individuals acquire permanent full-time employment, their interests and, accordingly their appetite for collective bargaining, are likely to be quite different from those of permanent full-time employees.

15. The differences in the terms and conditions of employment between Kitchen and the other lab technicians are not insignificant. These differences emphasize the fact that Kitchen is in a less permanent relationship with the respondent and the fact that his bargaining interests are quite different from those of the other lab technicians. The fact that Kitchen does not receive any benefits is consistent with a recognition by the employer that Kitchen is in quite a different position than the other lab employees. Given Kitchen's different bargaining interests and his minority position, the Board may well be ensuring that his interests would not be addressed if it were to include him in the full-time bargaining unit.

16. Kitchen is the one remaining employee at the date of the making of the application who would not fall into the bargaining unit given our decision to exclude students employed in a co-operative training program. In such a situation, the Board would not give the exclusion and would include such an employee in the bargaining unit if that employee is a member of the trade union seeking bargaining rights (See *Fort Frances Clinic*, [1983] OLRB Rep. Aug. 456). Contrary to the submission of counsel for the respondent (as set forth in the final sentence of paragraph 9 of this decision), as a result of that well-established Board practice, in the particular circumstances in this case it is ultimately Kitchen's own choice as to whether he is to be included in or excluded from the full-time bargaining unit.

17. Therefore, having regard to the Board's usual practice, the particular facts in this case and the submissions of the parties, the Board will exclude students employed in a co-operative training program from the bargaining unit in this application.

18. The only outstanding issue in dispute between the parties is whether Gordon Hennin, Laboratory Supervisor, is excluded from the bargaining unit because he exercises managerial functions under 1(3)(b) of the Act. The Board hereby appoints a Board Officer to inquire into and report back to the Board on the duties and responsibilities of Gordon Hennin.

1901-86-R Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, Applicant, v. **Twistex Yarns Inc.**, Respondent, v. Group of Employees, Objectors

Certification - Petition - Documents indicating opposition to union filed after terminal date - Original petition stolen from company bulletin board - Board declining to exercise its discretion to extend terminal date

BEFORE: *V. Solomatenko*, Vice-Chairman, and Board Members *G. O. Shamanski* and *J. Sarra*.

APPEARANCES: *Fernando DaSilva* for the applicant; *Joe Ariagno* for the respondent; *Greg Cullen* and *Ann Wagar* for the group of employees.

DECISION OF THE BOARD; November 12, 1986

1. The name of the respondent is amended to read: "Twistex Yarns Inc."
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in Cornwall, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining.
5. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on October 15, 1986, the terminal date fixed for this application and the date which the Board determines under section 103(2)(j) of the *Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.
6. The membership evidence demonstrates that the union has a level of support in excess of that required under the Act for certification without having a representation vote taken. However, a statement of desire (hereinafter referred to as the "petition") to oppose the union's application was filed in a timely fashion pursuant to the Board's Rules of Procedure. The petition consists of a single document dated October 14, 1986, signed by six individuals. The Board is satisfied that this document on its own does not contain a sufficient number of signatures of those employees who had also signed union membership cards as would cause the Board to exercise its discretion under section 7(2) of the Act to direct the taking of a representation vote, even if satisfied that the document represented a voluntary expression of those signing it. Therefore, the Board would not normally inquire into the voluntariness of that petition and the applicant would be entitled to certification without a representation vote.
7. However, three additional documents in connection with this application were placed before the Board on the day of the hearing in the matter on October 24, 1986. The first of these documents was an undated typed statement signed by four individuals stating that the original statement of opposition to the union was stolen and disposed of by an unnamed employee on October 14, 1986. It seems this original statement, which preceded the petition that was filed in a timely fashion herein, had been posted for three or four days in the mill on a bulletin board to which all employees and members of management had access. The Board was advised that it contained six or seven signatures before it was posted and eight or nine at the time it was stolen.
8. The other two documents placed before the Board purported to be statements of opposition to the union. One was typed and contained two signatures, the other was handwritten and contained eleven signatures. Both documents were undated, but the Board was advised that the signatures therein were obtained between October 15th and 20th, that is, subsequent to the terminal date. The employees objecting to the union are requesting that the Board accept these documents as evidence of opposition to the union for purposes of this application. If the Board were to accept these latter two documents, there would be a sufficient overlap of signatures of those employees who had signed both these documents and union membership cards and, if satisfied as to their voluntariness, the Board would exercise its discretion to order a representation vote.
9. Section 73(1) of the Board's Rules of Procedure provides:

Evidence of membership in a trade union or of objection by employees to certification of a trade

union or of signification by employees that they no longer wish to be represented by a trade union *shall not be accepted by the Board* on an application for certification or for a declaration terminating bargaining rights unless the evidence is in writing, signed by the employee or each member of a group of employees, as the case may be, and,

- (a) is accompanied by,
 - (i) the return mailing address of the person who files the evidence, objection or signification, and
 - (ii) the name of the employer; and
- (b) *is not filed later than the terminal date for the application.*

[emphasis added]

Furthermore, the "Form 6 - Notice to Employees" (Green Sheet), which was posted on the employer's premises on October 8, 1986 in the instant application, stipulates that a statement of desire will not be accepted by the Board if it is not either received by the Board or mailed by registered mail no later than the terminal date.

10. By asking the Board to accept the documents presented on the date of the hearing, the objecting employees herein are in essence requesting the Board to extend the terminal date, which is October 15, 1986 for purposes of this application. The Board has the discretion to vary or extend the terminal date pursuant to section 82(2) of the Rules of Procedure. Although the Board does not exercise that discretion lightly, it also does not use a rigid formula for determining whether there has been sufficient notice given with respect to any application. Instead, it will consider the merits of each request for an extension in the context of the circumstances relevant to the request: (see, generally, *Hostess Food Products Limited*, [1980] OLRB Rep. May 710 and *Kilean Lodge Incorporated*, [1977] OLRB Rep. April 240).

11. Much of the Board's jurisprudence in this regard has been directed to the question of whether there was sufficient time between the posting of the Form 6 Notice and the terminal date. In the instant application, however, there was no allegation that there was inadequate time between the two dates to provide employees with an opportunity to file a petition or statement of desire. In fact, the Board is advised that the stolen document had been affixed to the bulletin board for three or four days. In essence, the sole purpose of trying to file these documents at this time is to counteract the loss of that first document which would have been presented as a statement of desire to oppose the union. Regardless of the improper actions of the person who removed the document from the bulletin board, the objecting employees must accept the consequences of their own actions in this instance.

12. It is really a matter of common sense that to leave a document of this nature unattended on a bulletin board is to do so at one's own peril. From the more technical aspect of the Board's requirements of proof of voluntariness, to relinquish custody of a statement of desire or petition in this manner fatally taints its voluntariness. The very circumstances of the loss of the document demonstrate that the objecting employees were no longer in a position to provide direct evidence either as to the custody and control of the document throughout its entire period of circulation or as to the circumstances surrounding each signature therein. In essence, to grant an extension of the terminal date herein would be tantamount to giving the objecting employees an opportunity to start afresh in their efforts to oppose this application in circumstances wherein they were the authors of their own misfortune. Such is not an appropriate reason for the Board to exercise its discretion to extend a terminal date.

13. The Board hereby confirms its oral decision at the hearing that it declines to exercise its discretion to extend the terminal date for this application and therefore does not accept into evidence the statements of desire which were presented on the day of the hearing.

14. A certificate will issue to the applicant.

0483-83-M; 1938-86-JD Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, Applicant, v. **West York Construction Ltd.**, Respondent, v. Metropolitan Toronto Apartment Builders' Association, Intervener, v. Labourers' International Union of North America, Local 183, Intervener #2, v. The Ontario Form Work Association, Intervener #3, v. The Form Work Council of Ontario, Intervener #4; **West York Construction Ltd.**, Complainant, v. Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, Respondent(s), v. Metropolitan Toronto Apartment Builders' Association, Intervener, v. Labourers' International Union of North America, Local 183, Intervener #2, v. The Ontario Form Work Association, Intervener #3, v. The Form Work Council of Ontario, Intervener #4

Adjournment - Construction Industry Grievance - Jurisdictional Dispute - Practice and Procedure - Sector Determination - Whether Board should proceed with sector determination or defer to mediation efforts of Industrial Inquiry Commissioner

BEFORE: *Harry Freedman*, Vice-Chairman, and Board Members *D. A. MacDonald* and *N. Wilson*.

APPEARANCES: *Douglas J. Wray*, *James Smith* and *John Cartwright* on behalf of the Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America; *Richard J. Charney* and *Karl Mallette* on behalf of **West York Construction Ltd.**, and Metropolitan Toronto Apartment Builders' Association; *Carl W. Peterson* and *Ernesto Arduini* on behalf of The Ontario Form Work Association; *S.B.D. Wahl* and *R. Lotito* on behalf of The Form Work Council of Ontario and Labourers' International Union of North America, Local 183.

DECISION OF THE BOARD; November 6, 1986

1. The Board delivered the following oral decision at the hearing in these matters on November 3, 1986;

The Board has before it a referral of a grievance to arbitration under section 124 of the *Labour Relations Act* (Board File No. 0483-83-M) and a complaint over an assignment of work under section 91 of the Act (Board File No. 1938-86-JD). The grievance proceeding has been before the Board since June, 1983 and for a number of reasons, has not come before the Board for

hearing until today. The complaint concerning the work assignment was filed in October, 1986.

Both the grievance and the work assignment complaint arise out of the sub-contracting of concrete forming work in respect of the Kipling Acres Home for the Aged in Metropolitan Toronto. The grievance and the complaint have given rise to an issue as to whether the construction work done at Kipling Acres was work performed in the industrial, commercial and institutional sector or some other sector of the construction industry.

Counsel for the Carpenters' submits that the Board should proceed with the sector determination since that determination will be relevant, as all parties agree, to both proceedings.

Counsel for all of the other parties submit that the matter should be deferred until the report of the Industrial Inquiry Commissioner appointed by the Minister of Labour on November 4, 1985 is given to the Minister.

The terms of reference of the Commissioner are:

"Pursuant to section 35 of the Labour Relations Act, I hereby establish an industrial inquiry commission consisting of one member to inquire into and mediate an industrial dispute between the Metropolitan Toronto Apartment Builders Association and various trade unions engaged in concrete forming in the construction industry in Metropolitan Toronto, such commission to report to me indicating whether or not a settlement of the dispute has been effected."

We have been advised by the parties that the Industrial Inquiry Commissioner has been attempting to mediate the dispute referred to in the terms of reference of his appointment. Those mediation efforts have not been particularly active for the last several months. Nevertheless, his appointment has not been revoked and his report remains outstanding.

It is clear to us that the grievance and the work assignment complaint are manifestations of the dispute between the Metropolitan Toronto Apartment Builders' Association and various unions over concrete forming work. While a sector determination hearing at this point may help in getting to a resolution of the two proceedings that are presently before the Board, we believe that the issues in these two proceedings might be better resolved, if possible, through the mediation efforts of the Industrial Inquiry Commissioner. Obviously, any agreement satisfactory to all parties affected is preferable to a litigated decision that is imposed on them by the Board. The mediation process will also allow the larger concerns of the parties in the concrete forming portion of the construction industry to be aired in a forum and manner that might not be appropriate in litigation before this Board. Therefore, we believe it is appropriate to defer any further consideration of these matters by the Board for a period of time in order to permit further mediation.

While we would prefer to see a mediated resolution of the issues that give rise to these proceedings, we are also sensitive to the Carpenters' position

that the prosecution of their legal rights under their collective agreement and under the Act are being impeded. We do not believe that we should permit the exercise of the Carpenters' rights to be held in abeyance to some indeterminate future time. Rather, the parties and the Industrial Inquiry Commissioner should strive to reach a settlement in the near future. If no mediated resolution of the issue is achieved, then these proceedings should commence and continue expeditiously until completed.

Therefore, we hereby defer further consideration of these matters until February 16, 1987. If the Board is advised that no settlement has been reached, the Registrar is directed to list these matters for hearing. These matters will not be listed for hearing unless one of the parties requests the Registrar to schedule the hearing.

We note that the parties wish to raise several preliminary matter relating to the manner in which the Board should deal with these two proceedings. We declined to hear the parties' submissions on these preliminary issues at this time. It appears to us that those submissions can be made to the Board if the hearing in these matters should resume.

We also note that although this panel of the Board is not seized with these proceedings, we will request the Registrar to attempt to reconstitute this panel in the event the hearing resumes after February 16, 1987.

We again urge all parties to make their best efforts at reaching a mediated resolution of the issues with the assistance of the Industrial Inquiry Commissioner.

This matter is hereby adjourned.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING OCTOBER 1986

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1360-85-R: Amalgamated Clothing and Textile Workers Union (Applicant) v. Genestai Manufacturing Limited and Hematite Manufacturing Limited (Respondents) v. Group of Employees (Objectors)

Unit: "all employees of the respondents in the City of Guelph, save and except foremen, persons above the rank of foreman, office and sales staff and professional engineering staff" (94 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2961-85-R; 2962-85-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Group Electric Company Limited (Respondent)

Unit #1: "all electricians and electricians' apprentices in the employ of the respondents in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

Unit #2: "all electricians and electricians' apprentices in the employ of the respondents in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

0583-86-R: Christian Labour Association of Canada (Applicant) v. Geri-Care Nursing Home of Caressant Care Limited (Respondent)

Unit #1: "all employees of the respondent in its nursing home at Harriston, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff and persons for whom any trade union held bargaining rights as of May 27, 1986" (31 employees in unit)

Unit #2: "all employees of the respondent in its rest home at Harriston, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff and persons for whom any trade union held bargaining rights as of May 27, 1986" (9 employees in unit)

0680-86-R: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. 584317 Ontario Limited, carrying on business as R. & H. Electric Co.; Concept Electric Inc. (Respondents)

Unit #1: "all electricians and electricians' apprentices in the employ of 584317 Ontario Limited, carrying on business as R. & H. Electric Co. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (13 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all electricians and electricians' apprentices in the employ of 584317 Ontario Limited, carrying on business as R. & H. Electric Co. in The Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional

Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (13 employees in unit) (*Having regard to the agreement of the parties*)

0746-86-R: United Steelworkers of America (Applicant) v. Grand & Toy Limited (Respondent) v. Graphic Communications International Union, Local 500-M (Intervener) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at 33 Greenbelt Drive in the Regional Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, assistant supervisor in the shipping department, secretary to the warehouse manager, maintenance mechanics and mechanics helpers, security guard, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period" (140 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0869-86-R: Canadian Union of Public Employees (Applicant) v. Cours Claudel c.o.b. as Lycee Claudel (Respondent)

Unit: "all employees of the respondent in Ottawa, save and except Administrator, persons above the rank of Administrator, Secretary General, Proviseur, persons paid by the Government of France, including volunteers from the National Service during the active portion of their national service and employees in bargaining units for which any trade union held bargaining rights as of June 26, 1986, being the date of application" (2 employees in unit) (*Having regard to the agreement of the parties*)

1381-86-R: International Brotherhood of Electrical Workers Local Union 804 (Applicant) v. Engineered Electric Controls Limited (Respondents)

Unit: "all electricians and electricians' apprentices employed by the respondent at or out of Cambridge, Ontario, save and except non-working foremen, persons above the rank of non-working foreman, office and sales staff" (10 employees in unit) (*Having regard to the agreement of the parties*)

1437-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. J. Perez Construction (Toronto) Corp. (Respondent) v. Group of Employees (Objectors)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

1448-86-R: Service Employees Union, Local 478 (Applicant) v. Lajambe Forest Products Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Sundridge, Ontario, save and except supervisors, persons above the rank of supervisor, office, sales and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (37 employees in unit) (*Having regard to the agreement of the parties*)

1485-86-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Whitehall Plumbing and Heating (Respondent)

Unit #1: "all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit) (*Clarity Note*)

Unit #2: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit) (*Clarity Note*)

1773-86-R: Labourers International Union of North America, Local 607 (Applicant) v. Peter Panotin & Sons Ltd. (Respondent)

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

Unit #2: “all construction labourers in the employ of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

1508-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. Denjon Construction Ltd. (Respondent)

Unit: “all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same and all construction labourers and truck drivers in the employ of the respondent in the District of Rainy River in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (43 employees in unit)

1599-86-R: United Steelworkers of America (Applicant) v. Bristol Metal Industries of Canada Ltd. (Respondent)

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, those above the rank of supervisor, office and sales staff” (33 employees in unit) (*Having regard to the agreement of the parties*)

1601-86-R: United Food and Commercial Workers International Union, AFL, CIO, CLC (Applicant) v. Cobi Foods Inc. (Respondent)

Unit: “all employees of the respondent in the Municipality of Bloomfield and its Loch Sloy Warehouse, save and except forepersons, persons above the rank of foreperson, office staff, night watch persons, retail stores clerk/manager and employees for which any trade union held bargaining rights as of September 2nd, 1986” (134 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1608-86-R: United Food and Commercial Workers International Union (Applicant) v. Valley Transportation Company Limited (Respondent)

Unit #1: “all employees of the respondent in the Town of Deep River, save and except supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period” (8 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of the respondent in the Town of Deep River, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor and office staff” (10 employees in unit) (*Having regard to the agreement of the parties*)

1609-86-R: United Food and Commercial Workers International Union (Applicant) v. Skelhorn's Bus Line Limited (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent at Petawawa, regularly employed for not more than twenty-four hours

per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor and office staff" (20 employees in unit) (*Having regard to the agreement of the parties*)

1625-86-R: Office & Professional Employees International Union (Applicant) v. CAW Legal Services Plan (Respondent)

Unit: "all employees of the respondent in the Province of Ontario, save and except supervisors, persons above the rank of supervisor and students employed during the school vacation period" (57 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1627-86-R: Canadian Staff Union (Applicant) v. Labour Council of Metropolitan Toronto (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except president, office and clerical employees and employees in bargaining units for which any trade union held bargaining rights as of September 5, 1986" (2 employees in unit) (*Having regard to the agreement of the parties*)

1640-86-R: United Steelworkers of America (Applicant) v. Spun Steel Ltd. (Respondent)

Unit: "all employees of the respondent in Strathroy, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, and students employed during the school vacation period" (104 employees in unit) (*Having regard to the agreement of the parties*)

1649-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. Trent Valley Sand & Stone Limited (Respondent)

Unit: "all employees of the respondent in the Township of Bomby, save and except foremen, those above the rank of foreman, and office and sales staff" (12 employees in unit) (*Having regard to the agreement of the parties*)

1656-86-R: Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild (CLC-AFL-CIO) (Applicant) v. The Globe and Mail, Division of Canadian Newspapers Company Limited (Respondent)

Unit: "all employees in the circulation department of the respondent in the Province of Ontario regularly employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor, district sales representatives, assistant district sales representatives, and employees for whom a trade union held bargaining rights as of September 10th, 1986" (20 employees in unit) (*Having regard to the agreement of the parties*)

1673-86-R: Ontario Nurses' Association (Applicant) v. Canadian Red Cross Society (Respondent) v. Group of Employees (Objectors)

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent at its Blood Transfusion Service (Hamilton Centre), Hamilton, save and except Assistant Nursing Supervisor, persons above the rank of Assistant Nursing Supervisor, and persons regularly employed for not more than twenty-four (24) hours per week" (9 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all registered and graduate nurses employed for not more than twenty-four (24) hours per week in a nursing capacity by the respondent at its Blood Transfusion Service (Hamilton Centre), Hamilton, save and except Assistant Nursing Supervisor and persons above the rank of Assistant Nursing Supervisor" (4 employees in unit) (*Having regard to the agreement of the parties*)

1674-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. Laidlaw Waste Systems Ltd. (Respondent)

Unit: "all employees of the respondent at and out of Newmarket, Ontario, save and except Supervisors, persons above the rank of Supervisor, dispatcher, sales staff and office clerks" (9 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1681-86-R: Retail, Wholesale and Department Store Union, AFL-CIO-CLC (Applicant) v. Royal Oak Dairy Division of Ault Foods Limited (Respondent)

Unit: "all dependent contractor drivers of the respondent in the City of Hamilton, save and except supervisors and persons above the rank of supervisor" (25 employees in unit) (*Having regard to the agreement of the parties*)

1709-86-R: Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union Local 88 (Applicant) v. Cara Operations Limited (Respondent)

Unit #1: "all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent at 1011 Upper Middle Road East, Oakville, Ontario, save and except assistant hostesses, persons above the rank of assistant hostess, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period" (31 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: "all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent at 1011 Upper Middle Road East, Oakville, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except assistant hostesses and persons above the rank of assistant hostess" (48 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1724-86-R: Communications and Electrical Workers of Canada (Applicant) v. G & B Tas Holding Ltd. c.o.b. as Chatham Telephone Answering Service (Respondent)

Unit #1: "all employees of the respondent in Chatham, Ontario, save and except supervisors, those above the rank of supervisor, persons employed for not more than twenty-four hours per week and students employed during the school vacation period" (10 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent in Chatham, Ontario regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors and those above the rank of supervisor" (10 employees in unit) (*Having regard to the agreement of the parties*)

1736-86-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Barrymore Carpet Distributors Limited (Respondent)

Unit: "all employees of the respondent in Mississauga, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period" (14 employees in unit) (*Having regard to the agreement of the parties*)

1743-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. V.J.R. Contractor (Respondent)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

1744-86-R: Labourers' International Union of North America, Local 597 (Applicant) v. B. R. Foundations Ltd. (Respondent)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institu-

tional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1745-86-R: Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, on behalf of Locals 1007; 1151; 1244; 1425; 1592; 1916 & 2309 (Applicant) v. Robert Globe Electrical and Mechanical Ltd. (Respondent)

Unit: "all employees of the respondent above the rank of foreman, office and sales staff, and persons in bargaining units for which any trade union held bargaining rights as of September 30, 1986" (4 employees in unit)

1746-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. Vaughan Paving Ltd. (Respondent)

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

1782-86-R: Teamsters Union Local 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Microfurnace Ltd. (Respondent)

Unit: "all employees of the respondent in the Regional Municipality of Niagara, save and except supervisors, those above the rank of supervisor, office, clerical and sales staff and students employed during the school vacation period" (20 employees in unit) (*Having regard to the agreement of the parties*)

1783-86-R: Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Byers-Bush Ltd. (Respondent)

Unit: "all employees of the respondent in Mississauga, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period" (22 employees in unit) (*Having regard to the agreement of the parties*)

1785-86-R: Labourers' International Union of North America, Ontario District Council (Applicant) v. 619138 Ontario Limited (Respondent)

Unit #1: "all employees of the respondent in its M.D.R. Division engaged in the erection and finishing of precast concrete products in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Unit #2: "all employees of the respondent in its M.D.R. Division engaged in the erection and finishing of precast concrete products in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

pality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

1788-86-R: Labourers’ International Union of North America, Local 183 (Applicant) v. York Condominium Corporation No. 461 (Respondent)

Unit: “all employees of the respondent engaged in cleaning and maintenance at 475 The West Mall, Etobicoke, Ontario, save and except property manager, persons above the rank of property manager and office and clerical staff” (3 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1803-86-R: Brewery, Malt and Soft Drink Workers, Local 304 (Applicant) v. Diversey Wyandotte Inc. (Respondent)

Unit: “all employees of the respondent in its Equipment Division in Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period” (10 employees in unit) (*Having regard to the agreement of the parties*)

1805-86-R: Labourers’ International Union of North America, Local 1089 (Applicant) v. M & T Contractors (Respondent)

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit) (*Clarity Note*)

Unit #2: “all construction labourers in the employ of the respondent in the County of Lambton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit) (*Clarity Note*)

1820-86-R: Teamsters Local Union 424, Chemical, Energy and Allied Workers, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Jay Vee Waterbed and Heaters Limited, c.o.b. as Jay-Vee Canada (Respondent)

Unit: “all employees of the respondent in Niagara Falls, save and except supervisors, persons above the rank of supervisor, clerical, office and sales staff, research and development staff and students employed during the school vacation period” (69 employees in unit) (*Having regard to the agreement of the parties*)

1821-86-R: Labourers’ International Union of North America, Local 607 (Applicant) v. Miller Paving Limited (Respondent) v. United Brotherhood of Carpenters and Joiners of America Local Union 1669 (Intervener)

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman” (16 employees in unit)

Unit #2: “all construction labourers in the employ of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (16 employees in unit)

1822-86-R: Labourers’ International Union of North America, Local 491 (Applicant) v. Manitoulin Mining and Tunelling (Respondent)

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

Unit #2: “all construction labourers in the employ of the respondent within a radius of 81 kilometres (approximately 50 miles) of the Timmins Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

1829-86-R: International Union of Operating Engineers, Local 796 (Applicant) v. Beaver Foods Limited (Respondent)

Unit: "all employees of the respondent at its Nutricare Division in Kemptville regularly employed for 24 hours per week or less and students employed during the school vacation period, save and except office staff, graduate dieticians, student dieticians, technical personnel, supervisors (department heads), persons above the rank of supervisor and employees in bargaining units for which any trade union held bargaining rights as of September 26, 1986" (7 employees in unit) (*Having regard to the agreement of the parties*)

1874-86-R: United Brotherhood of Carpenters and Joiners of America, Local Union 27 (Applicant) v. Square One Carpentry Inc. (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

1884-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Stradel Contracting Limited (Respondent)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

1943-86-R: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Pro-Current Electrical Services Limited (Respondent)

Unit #1: "all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

Unit #2: "all electricians and electricians' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

1959-86-R: Ironworkers District Council of Ontario (Applicant) v. Robert McAlpine Ltd. (Respondent)

Unit #1: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Unit #2: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar,

and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0539-85-R: Ontario Public School Teachers' Federation (Applicant) v. The Board of Education for the City of Etobicoke (Respondent)

Unit: "all occasional teachers employed by the respondent in its elementary panel in the City of Etobicoke, save and except employees in bargaining units for which any trade union held bargaining rights as of June 4, 1985, being the date of application" (196 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	195
Number of persons who cast ballots	132
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	119
Number of ballots marked against applicant	11

1356-85-R: Ontario Public School Teachers' Federation (Applicant) v. The Wellington Board of Education (Respondent)

Unit: "all occasional teachers employed by the respondent in its elementary panel in the County of Wellington, save and except employees in bargaining units for which any trade union held bargaining rights as of August 30, 1985 being the date of application" (344 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	268
Number of persons who cast ballots	133
Number of spoiled ballots	8
Number of ballots marked in favour of applicant	92
Number of ballots marked against applicant	33

0599-86-R: Ontario Catholic Occasional Teachers' Association (Applicant) v. The Halton Roman Catholic Separate School Board (Respondent)

Unit: "all occasional teachers employed by the respondent in its schools in the Regional Municipality of Halton, save and except employees in bargaining units for which any trade union held bargaining rights as of May 30, 1986" (151 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer	144
Number of persons who cast ballots	26
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	25
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	4
Ballots segregated and not counted	1

0762-86-R: Ontario Catholic Occasional Teachers' Association (Applicant) v. Ottawa Catholic Separate School Board (Respondent)

Unit: "all occasional teachers employed by the respondent in the Cities of Ottawa and Vanier and the Village of Rockcliffe, save and except those employees teaching in schools pursuant to Part XI of the *Education Act* and employees in bargaining units for which any trade union held bargaining rights as of June 17, 1986" (155 employees in unit)

Number of names of persons on revised voters' list	159
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Number of persons who cast ballots	20	
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	19	
Number of segregated ballots cast by persons whose names appear on voters' list	1	
Number of ballots marked in favour of applicant		18
Number of ballots marked against applicant		1
Ballots segregated and not counted		1

0857-86-R: Ontario Catholic Occasional Teachers' Association (Applicant) v. The Sudbury District Roman Catholic Separate School Board (Respondent)

Unit: "all occasional teachers employed by the respondent in the Districts of Sudbury and Manitoulin, save and except employees teaching in schools established pursuant to Part XI of the *Education Act* and employees in bargaining units for which any trade union held bargaining rights as of June 25, 1986" (55 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list		66
Number of persons who cast ballots	27	
Number of ballots marked in favour of applicant		25
Number of ballots marked against applicant		2

1246-86-R: Canadian Union of Public Employees (Applicant) v. Corporation of the Town of Mount Forest (Respondent)

Unit: "all employees of the respondent in Mount Forest save and except foremen, persons above the rank of foreman, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period" (35 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer		13
Number of persons who cast ballots	7	
Number of ballots marked in favour of applicant		7
Number of ballots marked against applicant		0

1306-86-R: Canadian Union of Public Employees (Applicant) v. Essex County Association for the Mentally Retarded (Respondent)

Unit: "all employees of the respondent in the County of Essex, save and except supervisors of staff, persons above the rank of supervisor of staff, office and clerical staff, drivers, clients of the respondent employed in vocational training programs, persons employed under the category of Employment Opportunity Projects, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period" (112 employees in unit) (*Clarity Note*)

Number of names of persons on revised voters' list		21
Number of persons who cast ballots	21	
Number of ballots marked in favour of applicant		14
Number of ballots marked against applicant		7

1401-86-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. Consolidated Building Maintenance Services Limited (Respondent) v. Service Employees International Union, Local 204 (Intervener)

Unit: "all employees of the respondent at the O'Keefe Centre, Toronto, save and except employees in bargaining units for which any trade union held bargaining rights as of August 7, 1986" (3 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer		3
Number of persons who cast ballots	3	

Number of ballots in favour of applicant	3
Number of ballots in favour of intervener	0

1583-86-R: Ontario Public School Teachers' Federation (Applicant) v. The Prince Edward County Board of Education (Respondent)

Unit: "all occasional teachers employed by the respondent in its elementary panel in the County of Prince Edward save and except employees in bargaining units for which any trade union held bargaining rights as of September 2, 1986" (79 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	50
Number of persons who cast ballots	24
Number of ballots marked in favour of applicant	23
Number of ballots marked against applicant	1

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

2372-85-R: Service Employees Union, Local 210, Affiliated With Service Employees International Union, AFL-CIO-CLC (Applicant) v. Keytours Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Keytours Inc. in the City of Windsor, save and except supervisors, persons above the rank of supervisor, executive secretary to the owners and students employed during the school vacation period" (60 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	66
Number of persons who cast ballots	52
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	39
Number of segregated ballots cast by persons whose names appear on voters' list	13
Number of ballots marked in favour of applicant	37
Number of ballots marked against applicant	4
Ballots segregated and not counted	11

0670-86-R: United Steelworkers of America (Applicant) v. Ivaco Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Township of Longueuil (L'Orignal), save and except foremen, persons above the rank of foreman, office and clerical staff, sales staff, security guards, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, and persons in bargaining units for which any trade union held bargaining rights as of June 6, 1986" (17 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	16
Number of persons who cast ballots	16
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	5

Applications for Certification Dismissed Without Vote

2988-85-R: Ironworkers District Council of Ontario (Applicant) v. Farmer Fabrication Limited (Respondent) (3 employees in unit)

3039-85-R: Teamsters Chemical Energy & Allied Workers Union Local 424 (Applicant) v. Resco Chemicals & Colours Ltd. (Respondent) v. Group of Employees (Objectors) (12 employees in unit)

0879-86-R: Employees' Association of Euclid (V.M.E.) (Applicant) v. VME Equipment of Canada Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Guelph, save and except supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period" (17 employees in unit)

1432-86-R: Textile Processors, Service Trades, Health Care, Technical and Professional Employees International Union, Local 351 (Applicant) v. The Westin Hotel (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Ottawa regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except Assistant Supervisors, Security Staff, Front Desk Staff, Office and Sales Staff, Concierge, Bell Captain, persons employed as Maitre d', Head Greeter, Lead Captain, Captain, Lead Banquet Bartender, and employees in bargaining units for which any trade union held bargaining rights as of August 12, 1986" (85 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1763-86-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Town of Smiths Falls (Respondent)

Unit: "all employees of the respondent at Smiths Falls, save and except foremen, persons above the rank of foreman, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, and employees for whom any trade union held bargaining rights on September 18, 1986" (34 employees in unit) (*Having regard to the agreement of the parties*)

1807-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Dominion Mechanical Contractors Incorporated (Respondent) (3 employees in unit)

1844-86-R: Great Lakes Fishermen and Allied Workers' Union (Applicant) v. Saco Fisheries Limited (Respondent) (27 employees in unit)

1854-86-R: Local Union 527 United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada AFL-CIO-CFL (Applicant) v. Campbell Cox Fabricating Limited (Respondent) (23 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

1765-86-R: Energy and Chemical Workers Union (Applicant) v. Taro Pharmaceuticals Inc. (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, sales and clerical staff and students employed during the school vacation period" (18 employees in unit)

Number of names of persons on revised voters' list		20
Number of persons who cast ballots	20	
Number of ballots marked in favour of applicant		2
Number of ballots marked against applicant		18

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

1013-85-R: International Union of Operating Engineers, Local 793 (Applicant) v. Rowad Pipeline Company Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

Number of names of persons on list as originally prepared by employer		1
Number of persons who cast ballots	1	
Number of ballots marked in favour of applicant		0

Number of ballots marked against applicant	1
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3151-85-R: United Food & Commercial Workers International Union (Applicant) v. Hanna-Dagmar Publications Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Town of Leamington, Ontario, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (80 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer	8
Number of persons who cast ballots	6
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	6

3159-85-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Cadet Cleaners Limited, c.o.b. as Cadet Uniform Services (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in its Cadet Uniform Services operation in the Municipality of Metropolitan Toronto save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period" (102 employees in unit)

Number of names of persons on list as originally prepared by employer	107
Number of persons who cast ballots	102
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	86
Ballots segregated and not counted	1

1433-86-R: United Steelworkers of America (Applicant) v. Atlas Alloys, a Division of Rio Algom Limited (Respondent)

Unit: "all employees of the respondent in the Regional Municipality of Sudbury, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, and students employed during the school vacation period" (4 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	4
Number of segregated ballots cast by persons whose names appear on voters' list	1
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	3
Ballots segregated and not counted	1

1519-86-R: International Molders & Allied Workers Union (Applicant) v. Jackson's Manufacturing and Machinery Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Tillsonburg, save except foremen, persons above the rank of foreman, office and sales staff" (31 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	28
Number of persons who cast ballots	28
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	17

Applications for Certification Withdrawn

1815-85-R; 2918-85-R: International Union of Operating Engineers, Local 793 (Applicant) v. Jim Bertram & Sons Construction Ltd. (Respondent) v. Group of Employees (Objectors)

1472-86-R: United Brotherhood of Carpenters' & Joiners of America Local Union 27 (Applicant) v. Todd-glen Construction Limited (Respondent) v. The Metropolitan Toronto Apartment Builders Association (Intervener)

1513-86-R: Amalgamated Clothing and Textile Workers' Union, AFL-CIO-CLC (Applicant) v. Donlee Plastics, Division of Donlee Manufacturing Industries Limited (Respondent)

1626-86-R: Ontario Public Service Employees Union (Applicant) v. Wasaga Beach Ambulance Unit, Town of Wasaga Beach (Respondent)

1668-86-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Honeywell Limited (Respondent) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Intervener)

1796-86-R: United Food and Commercial Workers International Union AFL, CIO, CLC, Local 1230 (Applicant) v. United Food and Commercial Workers International Union AFL, CIO, CLC, Local 1230 (Respondent)

1800-86-R: Canadian Association of Union Employees (Applicant) v. United Food and Commercial Workers Local 1230 AFL-CIO-CLC (Respondent)

1802-86-R: Labourers' International Union of North America, Local 1081 (Applicant) v. Lee Hurst Construction Limited (Respondent)

1818-86-R: United Plant Workers of America (Applicant) v. General Motors of Canada Limited (Respondent)

1834-86-R: United Steelworkers of America (Applicant) v. Renfrew Tape Ltd. (Respondent)

1869-86-R: United Steelworkers of America (Applicant) v. Cie Cable Vision Hawkesbury Ltee (Respondent)

1875-86-R: Energy and Chemical Workers Union (Applicant) v. Petro-Canada Inc. (Respondent)

1962-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. H. Kerr Construction Limited (Respondent)

2000-86-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Bay-Walsh Properties Limited General Contractors (Respondent)

2014-86-R: Service Employees Union, Local 268 (Applicant) v. The Nipigon Red-Rock Board of Education (Respondent)

2036-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Embaselli Incorporation and/or Greenwin Property Management and/or Greenwin Condominium Management (Respondents)

2090-86-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Elite Biltrite Systems Inc. (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

1223-86-FCA: Toronto Typographical Union, Local 91 (Applicant) v. Burlington Northern Air Freight (Canada) Ltd. (Respondent) (*Granted*)

1392-86-FC: The International Association of Machinists and Aerospace Workers (Applicant) v. Turbon Plastic Inc. (Respondent) (*Withdrawn*)

1480-86-FC: Toronto Typographical Union, Local 91 (Applicant) v. Fitzhenry and Whiteside Ltd. (Respondent) (*Withdrawn*)

1481-86-FC: Toronto Typographical Union, Local 91 (Applicant) v. Fitzhenry and Whiteside Ltd. (Respondent) (*Withdrawn*)

1495-86-FC: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Lodge 128 (Applicant) v. Teledyne Industries Canada Limited (Respondent) (*Dismissed*)

1700-86-FC: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Thorold I.G.A. Market (Respondent) (*Withdrawn*)

1795-86-FC: United Food and Commercial Workers' International Union, Local 175 (Applicant) v. Giant Timber Industries Limited (Respondent) (*Dismissed*)

1880-86-FC: The United Brotherhood of Carpenters and Joiners of America, Local Union 3054 (Applicant) v. Huron Steel Fabricators (London) Limited (Respondent) (*Dismissed*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2258-83-R: Retail, Commercial and Industrial Union, Local 206 (Applicant) v. Dominion Stores Ltd., Willett Foods Ltd., and C & J Maurice Family Holdings Inc. (also known as Mr. Grocer in Midland) (Respondents) (*Dismissed*)

1141-85-R: Labourers' International Union of North America, Local 183 (Applicant) v. Lebovic Enterprises Ltd., Norcliffe Homes Limited, West Hill Redevelopment Company Limited and West Hill Homes (Respondents) (*Withdrawn*)

3039-85-R: Resco Chemicals and Colours Ltd. and Resco Distributing Company Limited (Applicants) v. Teamsters Chemical Energy and Allied Workers Union, Local 424 (Respondent) (*Dismissed*)

1230-86-R: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. William S. Burnside (Canada) Limited and Cote & Ryde Construction Ltd. (Respondents) (*Withdrawn*)

2875-86-R: The United Brotherhood of Carpenters and Joiners of America, Local 38 (Applicant) v. Niagara Drywall Ltd., Davony Drywall Ltd., Ronald A. Grossi, Design Build Niagara Inc., D. B. N. Drywall and Acoustics Inc., Del McMillan Design Group Limited and Niagara-on-the-Lake Design Group Limited (Respondents) (*Withdrawn*)

3157-86-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. MCY Construction Ltd., and A. R. Taillefer Development Inc. (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

1138-85-R: Labourers' International Union of North America, Local 183 (Applicant) v. Lebovic Enterprises Ltd., Norcliffe Homes Limited, West Hill Redevelopment Company Limited and West Hill Homes (Respondents) (*Dismissed*)

1231-886-R: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. William S. Burnside (Canada) Limited and Cote & Ryde Construction Ltd. (Respondents) (*Withdrawn*)

1316-86-R: Vincent Darrel Furlotte (Applicant) v. Ault Dairies, a Division of Ault Foods Limited and Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Respondent) (*Withdrawn*)

1586-86-R: Hotel Employees and Restaurant Employees Union, Local 75 (Applicant) v. Marriott Chateau Flight Kitchen (Respondent) (*Withdrawn*)

1710-86-R: International Woodworkers of America (Applicant) v. Huber Fine Furniture Inc. (Respondent) (*Withdrawn*)

1925-86-R: Hotel Employees and Restaurant Employees Union, Local 75 (Applicant) v. Marriott Chateau Flight Kitchen (Respondent) (*Withdrawn*)

2258-83-R: Retail, Commercial and Industrial Union, Local 206 (Applicant) v. Dominion Stores Ltd., Willett Foods Ltd., and C & J Maurice Family Holdings Inc. (also known as Mr. Grocer in Midland) (Respondents) (*Dismissed*)

2875-84-R: The United Brotherhood of Carpenters and Joiners of America, Local 38 (Applicant) v. Niagara Drywall Ltd., Davony Drywall Ltd., Ronald A. Grossi, Design Build Niagara Inc., D. B. N. Drywall and Acoustics Inc., Del McMillan Design Group Limited and Niagara-on-the-Lake Design Group Limited (Respondents) (*Withdrawn*)

3158-86-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. MCY Construction Ltd., and A. R. Taillefer Development Inc. (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0315-84-R: Employees of Mr. Grocer #4014 (Stalba Ent. Inc.) (Applicant) v. Retail, Wholesale and Department Store Union, Local 141 AFL-CIO-CLC (Respondent) v. Stalba Enterprises Inc. (Intervener) (*Dismissed*)

0870-84-R: Paul Caseley (Applicant) v. Retail, Wholesale and Department Store Union, Local 141 AFL-CIO-CLC (Respondents) v. Jules Foods Limited (Intervener) (*Dismissed*)

0901-84-R: Larry Cavanagh (Applicant) v. Retail, Wholesale and Department Store Union, Local 141 AFL-CIO-CLC (Respondent) v. 579679 Ontario Inc. (Intervener) (*Dismissed*)

2754-85-R: Angela Lessard, et al. (Applicants) v. Canadian Union of Public Employees (Respondent)

Unit: "all employees regularly employed for not more than 24 hours per week, save and except the manager and persons above the rank of manager" (8 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer		8
Number of persons who cast ballots	7	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		7

2755-85-R: Lyse Lebrun, Samuel (David) Wilson (Applicants) v. London and District Service Workers' Union Local 220, Service Employees International Union (Respondent) v. Pioneer Youth Services Ltd. (Intervener) (*Dismissed*)

3219-85-R: Harry Clay (Applicant) v. United Electrical, Radio, and Machine Workers of America and its

Local 513 (Respondent) v. Haugh's Products Limited and Chim-Stall Limited, c.o.b. in partnership under the firm name of Haugh's Products (Intervener)

Unit: "all employees of the intervener, save and except foremen, persons above the rank of foreman, office and sales staff" (36 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer		29
Number of persons who cast ballots	26	
Number of ballots marked in favour of respondent		3
Number of ballots marked against respondent		23

0286-86-R; 1488-86-R: Mario Perfetti (Applicant) v. International Brotherhood of Electrical Workers, Local 353 (Respondent) v. Trident Holdings Limited c.o.b. as Trident Electric, Gambin Electric Co. Ltd. and Malvin Electric Intercom Systems (Interveners)

Unit: "all electricians and electricians' apprentices in the employ of the Joint Employer, performing work within the inside and outside jurisdictions as outlined in the Constitution of the IBEW in the Province of Ontario as set out in both the IBEW Principal Agreement and the Houseworking Agreement" (10 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer		18
Number of persons who cast ballots	17	
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	15	
Number of segregated ballots cast by persons whose names do not appear on voters' list	2	
Number of ballots marked in favour of respondent		1
Number of ballots marked against respondent		15
Ballots segregated and not counted		1

0307-86-R: Frank McInnes (Applicant) v. The United Brotherhood of Carpenters and Joiners of America, Local 38 (Respondent) (*Dismissed*)

0308-86-R: Reginald Lebel (Applicant) v. The United Brotherhood of Carpenters and Joiners of America, Local 38 (Respondent) (*Dismissed*)

0341-86-R: Ronald Verbass (Applicant) v. United Steel Workers of America (Respondent) (*Withdrawn*)

0350-86-R: Gary Atkinson (Applicant) v. U.A.-Local 787-Refrigeration Workers of Ontario (Respondent) v. Clare Moore Ltd. (Intervener) (*Withdrawn*)

0756-86-R: Mark Savory, Ken Savory and Paul Skirrow (Applicant) v. Christian Labour Association of Canada (Respondent) v. Savory Electric Limited (Intervener)

Unit: "all employees of Savory Electric Limited in the Counties of Brant and Norfolk, save and except non-working foremen, persons above the rank of non-working foreman and office staff" (3 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer		2
Number of persons who cast ballots	2	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		2

0826-86-R: R. Winkworth (Applicant) v. Communications, Electronic, Electrical, Technical and Salaried Workers of Canada and its Local 535 (Respondent) v. Super Plastics Corporation Limited (Intervener) (*Withdrawn*)

1189-86-R: Albilio Nunes, Ada Rotondo, Anna Spasevski, Donato, Domenica Colatosti, Harvinder Paul,

Blaz Razumic, Silvania Verrelli, Henry Pangowish and Royland Parris (Applicants) v. International Woodworkers of America (Respondent) v. Employee (Objector) (*Dismissed*)

1247-86-R: Adriano Marinelli (Applicant) v. United Steelworkers of America (Respondent) v. Architectural Plastics Limited (Intervener) (*Granted*)

1313-86-R: Derek Rennie (Applicant) v. Service Employees Union Local 204 (Respondent) (*Withdrawn*)

1360-86-R: Employees of Peachy's Pizza Parlor (Applicant) v. Retail, Wholesale & Department Store Union Local 429, AFL-CIO-CLC (Respondent) v. Peachy's Pizza Parlor, Riverside Acres of Timmins Ltd. (Intervener) (*Withdrawn*)

1382-86-R: Andrew Tan, on behalf of himself and a group of 14 other employees (Applicant) v. Amalgamated Clothing and Textile Workers Union, Toronto Joint Board (Respondent) v. Ports International Limited (Intervener) (*Withdrawn*)

1419-86-R: Michael O'Shaughnessy (Applicant) v. International Association of Machinists and Aerospace Workers Local Lodge 171 (Respondent) (*Granted*)

1435-86-R: Alfred Potts, Joe Narine, Ted Garinger, Brent Fast, Matthew Toth Steve Edgecombe, Kelly Edgecombe, Dave Dixon, Tim Virtue and Mike Zinger (Applicants) v. United Food and Commercial Workers' International Union Local 175 (Respondent) (*Dismissed*)

1715-86-R: Lynda Robertson, R.N. (Applicant) v. Ontario Nurses' Association (Local 134) (Respondent) (*Withdrawn*)

1914-86-R: Christine Biron (Applicant) v. Canadian Union of Public Employees and its Local 53 (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

1933-86-U: The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 628 (Applicant) v. Copper Cliff Mechanical Contractors Limited (Respondent) (*Withdrawn*)

2025-86-U: Mechanical Contractors Association Ontario; Mechanical Contractors Association Toronto (Applicants) v. PCL Industrial Constructors Inc.; The United Association of Journeymen and Apprentices of The Plumbing and Pipe Fitting Industry of The United States and Canada, Local 46 (Respondents) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2093-84-U; 2094-84-U: Dominnion Paving Limited (Applicant/Complainant) v. Labourers' International Union of North America, Local 183, International Union of Operating Engineers, Local 793, Amalgamated Transit Union, Local 113, Michael Reilly, Frank Spera, John Ricciuto, James Carruthers and Roy Hinds (Respondents) (*Dismissed*)

2369-84-U: Angelo Ritrovato (Complainant) v. International Union of Operating Engineers, Local 793 (Respondent) (*Granted*)

0181-85-U: Anthony Gene Woodhouse (Complainant) v. International Brotherhood of Bridge, Structural & Ornamental Ironworkers Local Union 736 (Respondent) (*Dismissed*)

2396-85-U: Don Roe, Dave Noble, Dan Dailey, Dale Smythe and Gary Crack (Complainants) v. United Steelworkers of America on behalf of Local Union 5595 (Respondents) (*Dismissed*)

2835-85-U: Textile Processors Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Complainant) v. Cornwall Plastic Products (Respondent) (*Withdrawn*)

3002-85-U: International Brotherhood of Electrical Workers, Local 353 (Complainant) v. Galil Electric Company Limited and Group Electric Company Limited (Respondents) (*Granted*)

0268-86-U: Labourers' International Union of North America, Local 491 (Complainant) v. Klimack Construction Limited (Respondent) (*Withdrawn*)

0309-86-U: Great Lakes Fishermen and Allied Workers' Union Domingo Bello, Joes Gandaio (Complainants) v. Kingsville Fishermen's Company Limited c.o.b. as Kingsville Fishermen's Co-Op and/or Fishermen's Co-op (Respondents) (*Withdrawn*)

0413-96-U: Aluminum, Brick and Glass Workers International Union, Local 212-G (Complainant) v. Canadian Vitrified Products (Respondents) (*Withdrawn*)

0486-86-U: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46 (Complainant) v. Victory Plumbing Inc. (Respondent) (*Withdrawn*)

0487-86-U: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46 (Complainant) v. Victory Plumbing Inc. (Respondent) (*Withdrawn*)

0555-86-U: Zulfikar J. Lalji (Complainant) v. United Electrical Radio and Machine Workers of Canada, Local 542, and GSW Limited (Respondents) (*Withdrawn*)

0727-86-U: International Union of Operating Engineers, Local 793 (Complainant) v. Courtice Auto Wreckers Limited (Respondent) (*Withdrawn*)

0807-86-U: Laurene F. Wiens (Complainant) v. Inco Metals (Respondent) (*Withdrawn*)

1009-86-U: Daniel Corsini (Complainant) v. Hotel Employees Restaurant Employees Union Local 75 (Respondent) (*Withdrawn*)

1317-86-U: Vincent Darrel Furlotte (Complainant) v. Ault Dairies, a Division of Ault Foods Limited and Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Respondents) (*Withdrawn*)

1326-86-U: International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 230 (Complainant) v. Carp Concrete Limited (Respondents) (*Withdrawn*)

1331-86-U: David Welsh (Complainant) v. Laundry and Linen Drivers and Industrial Workers Union, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Respondent) v. M.B.F. Industries Corporation (Intervener) (*Dismissed*)

1332-86-U: David Welsh (Complainant) v. M.B.F. Industries Corporation (Respondent) v. Laundry and Linen Drivers and Industrial Workers Union, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Intervener) (*Dismissed*)

1333-86-U: Sheet Metal Workers' International Association, Local 47 (Complainant) v. M. & Al Roofing Ltd. (Respondent) (*Withdrawn*)

1361-86-U: London and District Service Workers' Union, Local 220 (Complainant) v. Aylmer Nursing Home (Respondent) (*Withdrawn*)

136-86-U: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Metro Toronto News Company (Respondent) (*Withdrawn*)

1391-86-U: Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Metrans (Ontario) Inc. (Respondent) (*Withdrawn*)

1413-86-U: Retail, Wholesale and Department Store Union AFL-CIO-CLC (Complainant) v. Beta Taxi Ltd. c.o.b. as My-Way Taxi Rental & Services Ltd. (Respondent) (*Granted*)

1414-86-U: International Union of Operating Engineers, Local 793 (Complainant) v. Jim Bertram & Sons Construction Ltd. (Respondent) (*Withdrawn*)

1454-86-U: Control Technician II's, Bruce GS'A' (Complainant) v. CUPE Local 1000 (Respondent) v. Ontario Hydro (Intervener) (*Withdrawn*)

1456-86-U: Carpenter Local 249, Kingston Ontario (Complainant) v. The Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America, O.P.C. (Respondent) v. Carpenters Employer Bargaining Agency (Intervener) (*Dismissed*)

1468-86-U: Janis E. Klavins (Complainant) v. Ontario Public Service Employees' Union (Respondent) (*Withdrawn*)

1482-86-U: Gloria Parrales (Complainant) v. United Rubber, Cork Linoleum & Plastic Workers of America AFL-CIO-CLC (Respondent) (*Withdrawn*)

1483-86-U: Josefina Parrales (Complainant) v. United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO-CLC (Respondent) (*Withdrawn*)

1549-86-U: Amelia Drobný (Complainant) v. United Steelworkers of America (Local 6753) (*Withdrawn*)

1565-86-U: London and District Service Workers' Union, Local 220 (Complainant) v. Aylmer Nursing Home (Respondent) (*Withdrawn*)

1566-86-U: London and District Service Workers' Union, Local 220 (Complainant) v. Aylmer Nursing Home (Respondent) (*Withdrawn*)

1567-86-U: London and District Service Workers' Union, Local 220 (Complainant) v. Aylmer Nursing Home (Respondent) (*Withdrawn*)

1577-6-U: Murphy Manor Rest Home (Complainant) v. London and District Service Workers' Union, Local 220 (Respondent) (*Withdrawn*)

1607-86-U: Rob McIntyre, Rob Hiller, Tony Martin, Vic Perrotta (Complainants) v. United Steel Workers of America (Respondent) (*Withdrawn*)

1610-86-U: Marion J. Doak (Complainant) v. Extendicare Health Services Inc., The Gibson and Para Med Health Services Inc. (Respondents) (*Withdrawn*)

1616-86-U: Local 230 of the International Beverage Dispensers' & Bartenders Union of the Hotel and Restaurant Employees' and Bartenders' International Union (Complainant) v. Parkdale Hotel (Respondent) (*Withdrawn*)

1631-86-U: Canadian Union of Public Employees (Complainant) v. Residence St. Francois (Respondent) (*Withdrawn*)

1641-86-U: Paul Gallop (Complainant) v. United Food & Commercial Workers International Union Local 175 & its agents (Respondents) (*Withdrawn*)

1642-86-U: Paul Ward (Complainant) v. Work Wear Corporation of Canada (Respondent) (*Withdrawn*)

1653-86-U: Gregory O'Brien (Complainant) v. Eastern Construction (Respondent) (*Withdrawn*)

1657-86-U: James Sorenson (Complainant) v. Chrysler Canada Ltd. and Local 444 (Respondents) (*Withdrawn*)

1658-86-U: Local 580 UAW-AFL-CIO-CLC, Dresden Ontario (Complainant) v. Tri-County Tube Corporation Limited, Bothwell, Ontario and Local 580 UAW-AFL-CIO-CLC, Dresden Ontario (Respondent) (*Withdrawn*)

1661-86-U: London and District Service Workers' Union, Local 220 (Complainant) v. Aylmer Nursing Home (Respondent) (*Withdrawn*)

1662-86-U: London and District Service Workers' Union, Local 220 (Complainant) v. Aylmer Nursing Home (Respondent) (*Withdrawn*)

1663-86-U: London and District Service Workers' Union, Local 220 (Complainant) v. Aylmer Nursing Home (Respondent) (*Withdrawn*)

1664-86-U: London and District Service Workers' Union, Local 220 (Complainant) v. Aylmer Nursing Home (Respondent) (*Withdrawn*)

1665-86-U: London and District Service Workers' Union, Local 220 (Complainant) v. Aylmer Nursing Home (Respondent) (*Withdrawn*)

1666-86-U: London and District Service Workers' Union, Local 220 (Complainant) v. Aylmer Nursing Home (Respondent) (*Withdrawn*)

1667-86-U: London and District Service Workers' Union, Local 220 (Complainant) v. Aylmer Nursing Home (Respondent) (*Withdrawn*)

1683-86-U: Mrs. Sharon Groot (Complainant) v. Sheridan College, Oakville Campus (Respondent) (*Withdrawn*)

1701-86-U: United Food and Commercial Workers International Union, Locals 175 and 633 (Complainant) v. Thorold I.G.A. Market (Respondent) (*Withdrawn*)

1706-86-U: Mike Joffe (Complainant) v. Local Union 353, IBEW (Respondent) (*Withdrawn*)

1708-86-U: Canadian Union of Restaurant and Related Employees, Hotel Employees, Restaurant Employees Local 88 (Complainant) v. 412873 Ontario Limited c.o.b. as Swiss Chalet (Respondent) (*Withdrawn*)

1711-86-U: International Woodworkers of America, Local 2-700 (Complainant) v. Huber Fine Furniture, Huber Furniture Limited, John Krautwurst Furniture Limited, Rebu'h Furniture 1983 Company Limited (Respondents) (*Withdrawn*)

1735-86-U: Thorold I.G.A. Market (Complainant) v. United Food and Commercial Workers Union Local 175 and Local 633 and Mr. Frank Kelly (Respondents) (*Withdrawn*)

1756-86-U: George R. Porter (Complainant) v. Local 1572, Terry Topps President of the A.T.U. 1572 (Respondent) (*Withdrawn*)

1757-86-U: Raymond C. Health (Complainant) v. A.T.U. Local 1572 (Respondent) (*Withdrawn*)

1778-86-U: Enid J. Hand (Complainant) v. Ontario Nurses' Association (Respondent) (*Withdrawn*)

1779-86-U: Eugenia Sandri (Complainant) v. Bakery, Confectionary and Tobacco Workers International Union, Local 322 (affiliated with AFL-CIO-CLC) (Respondent) (*Withdrawn*)

1792-86-U: Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union Local 88 (AFL-CIO-CLC) (Complainant) v. Cara Operations Limited c.o.b. as Swiss Chalet Restaurant, Oakville (Respondent) (*Withdrawn*)

1846-86-U: Daniel Huider (Complainant) v. General Motors and UAW (Respondent) (*Withdrawn*)

1856-86-U: Labourers' International Union of North America, Local 1089 (Complainant) v. M & T Contractors Cement Work (Respondent) (*Withdrawn*)

1858-86-U: Reinaldo Santos (Complainant) v. Hotel Employees and Restaurant Employees Union Local 75 (Respondent) (*Withdrawn*)

1862-86-U: Lillo De Simone (Complainant) v. Metropolitan Toronto Civic Employees' Union Local 43 (Respondent) (*Withdrawn*)

1881-86-U: Robert G. Spearnin (Complainant) v. The Board of Governors of Exhibition Place Exhibition Stadium (Respondent) (*Dismissed*)

1887-86-U: W. A. Curtis (Complainant) v. C.P.U. Local 134, c/o Rec. Sec. Jacob Gustaw (Respondent) (*Withdrawn*)

1888-86-U: W. A. Curtis (Complainant) v. Local 134, C.P.U.-Jacob Gustlaw, Rec. Sec. (Respondent) (*Withdrawn*)

1889-86-U: W. A. Curtis (Complainant) v. C.P.U. Local 134: Jacob Gustlaw, Rec. Sec. (Respondent) (*Withdrawn*)

1890-86-U: W. A. Curtis (Complainant) v. C.P.U. Local 134-c/o Rec. Sec. Jacob Gustlaw (Respondent) (*Withdrawn*)

1891-86-U: W. A. Curtis (Complainant) v. C.P.U. Local 134: Jacob Gustlaw, Rec. Secretary (Respondent) (*Withdrawn*)

1944-86-U: United Food & Commercial Workers International Union (Complainant) v. Mirabai Art Glass Ltd., c.o.b. as Xena Designs (Respondent) (*Withdrawn*)

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1512-86-M: Canadian Union of Public Employees and its Local 1189 (Applicant) v. The Corporation of the City of Owen Sound (Respondent) (*Withdrawn*)

2597-85-M: United Steelworkers of America, Local 5338 (Applicant) v. Benwind Industries (Respondent) (*Granted*)

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0773-86-OH: Al Beamer (Complainant) v. Stelco Inc. (Respondent) (*Withdrawn*)

0755-86-OH: Michel Beaumier (Complainant) v. I.I.C. Mech. Tony Simankowicz (Respondent) (*Withdrawn*)

1295-86-OH: Philip Continisio on behalf of Nicola Continisio (Complainant) v. Local 506 Mr. Principato (Business Mgr.), Labourers International Union of North America (Respondent) (*Withdrawn*)

1311-86-OH: John T. Buklis (Complainant) v. Imperial Oil Ltd. (Respondent) (*Withdrawn*)

1705-86-OH: Paul Tole (Complainant) v. Harts Upholstered Products Co. Ltd. (Respondent) (*Dismissed*)

1770-86-OH: Barbara Sandor (Complainant) v. Canada Post (Respondent) (*Dismissed*)

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1580-85-M: Labourers' International Union of North America, Local 491 (Applicant) v. Lavern Construction (LCM Developments) (Respondent) (*Withdrawn*)

3156-85-M: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. MCY Construction Ltd. and A. R. Taillefer Development Inc. (Respondent) (*Withdrawn*)

0210-86-M: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. The Douglas MacDonald Development Corporation, Douglas MacDonald Development Corporation, Douglas MacDonald Homes Ltd., Douglas MacDonald Construction Limited and MacDonald Construction Ltd. (Respondents) (*Withdrawn*)

0631-86-M: United Brotherhood of Carpenters and Joiners of America, Local 1669 (Applicant) v. Environmental Technical Services Inc., Landmark Contracting Ltd., E.T.S. Towers Inc. (Respondents) (*Withdrawn*)

0889-86-M: Ontario Allied Construction Trades Council and its Affiliate International Union of Operating Engineers and its Local 793 (Applicants) v. Electrical Power Systems Contractors Association and Ontario Hydro, Darlington Generating Station (Respondent) (*Withdrawn*)

0986-86-M: Labourers' International Union of North America, Local 1059 (Applicant) v. Berken Construction Inc., Stimson Contracting Limited (Respondents) (*Granted*)

1188-86-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 787 (Applicant) v. Clare Moore Ltd. (Respondent) (*Withdrawn*)

1201-86-M: The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and Local 7 (Applicant) v. Teaphilus Masonry Inc. (Respondent) (*Withdrawn*)

1396-86-M: Sheet Metal Workers' International Association Local 562 (Applicant) v. Richards Mechanical Services Ltd. (Respondent) (*Granted*)

1397-86-M: Sheet Metal Workers' International Association Local 562 (Applicant) v. Hebel Sheet Metal Inc. (Respondent) (*Granted*)

1463-86-M: Labourers' International Union of North America, Local 506 (Applicant) v. George & Asmussen Limited (Respondent) (*Withdrawn*)

1535-86-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 463 (Applicant) v. Adam Clark Co. Ltd. (Respondent) (*Withdrawn*)

1604-86-M: Labourers' International Union of North America, Local 183 (Applicant) v. Aberdeen Highlands Construction Ltd. (Respondent) (*Withdrawn*)

1639-86-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 463 (Applicant) v. Harold R. Stark (Oshawa) Limited (Respondent) (*Granted*)

1686-86-M: International Union of Bricklayers and Allied Craftsmen, Local 2 (Applicant) v. Greco Construction Company (Respondent) (*Granted*)

1691-86-M: United Brotherhood of Carpenters & Joiners of America, Local Union 27 (Applicant) v. Nelnor Holdings Limited (Respondent) (*Granted*)

1695-86-M: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. Acme Building and Construction Limited (Respondent) (*Granted*)

1714-86-M: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Durwes Contracting Ltd. (Respondent) (*Granted*)

1731-86-M: International Brotherhood of Painters & Allied Trades Local 1795 (Applicant) v. Campbell Glass Limited (Respondent) (*Granted*)

1747-86-M: International Union of Operating Engineers, Local 793 (Applicant) v. E & E Seegmiller Limited (Respondent) (*Withdrawn*)

1750-86-M: United Brotherhood of Carpenters' & Joiners of America, Local Union 27 (Applicant) v. H.G. Susgin Construction (Respondent) (*Withdrawn*)

1751-86-M: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Norseman Drywall (Respondent) (*Withdrawn*)

1752-86-M: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Pancor Industry Limited (Respondent) (*Withdrawn*)

1755-86-M: Sheet Metal Workers International Association, Local Union 30 (Applicant) v. Dean-Chandler Roofing Limited (Respondent) (*Granted*)

1772-86-U: A Council of Trade Unions Acting as the Representative and Agent of Teamsters' Local Union 230 and Labourers' International Union of North America, Local 183 (Applicants) v. Dalv Construction Ltd. (Respondent) (*Withdrawn*)

1775-86-U: Labourers' International Union of North America, Local 597 (Applicant) v. Jervis B. Webb (Respondent) (*Withdrawn*)

1776-86-M: Labourers' International Union of North America, Local 183 (Applicant) v. Teskey Construction Company Limited (Respondent) (*Withdrawn*)

1777-86-M: Labourers' International Union of North America, Local 183 (Applicant) v. Unidrain Construction Ltd. (Respondent) (*Granted*)

1797-86-M: Ontario Sheet Metal Workers Conference Sheet Metal Workers International Association, Local 30 (Applicant) v. Campbell Cox Limited (Respondent) (*Withdrawn*)

1810-86-M: United Brotherhood of Carpenters & Joiners of America, Local Union 27 (Applicant) v. Imperial Caulking (Respondent) (*Granted*)

1823-86-M: Labourers' International Union of North America, Local 183 (Applicant) v. Two Star Carpentry (Applicant) (*Withdrawn*)

1826-86-M: Labourers' International Union of North America, Local 183 (Applicant) v. Westview Carpentry Company (Respondent) (*Withdrawn*)

1827-86-M: Labourers' International Union of North America, Local 183 (Applicant) v. D. W. Buchanan Construction Ltd. (Respondent) (*Withdrawn*)

1828-86-M: Labourers' International Union of North America, Local 183 (Applicant) v. Nimel Construction (Applicant) (*Granted*)

1831-86-M: The International Brotherhood of Boilermakers' Iron Ship Builders, Blacksmiths, Forgers and Helpers, Lodge 128 (Applicant) v. Millwrights Unlimited (Respondent) (*Withdrawn*)

1878-86-M: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Brunswick Drywall (Ontario) Ltd. (Respondent) (*Granted*)

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1908-86-M: United Brotherhood of Carpenters & Joiners of America, Local Union 27 (Applicant) v. Aldan Construction Limited (Respondent) (*Withdrawn*)

1909-86-M: United Brotherhood of Carpenters & Joiners of America, Local Union 27 (Applicant) v. Agri-gento Group (672259 Ontario Ltd.) (Respondent) (*Withdrawn*)

1910-86-M: United Brotherhood of Carpenters & Joiners of America, Local Union 27 (Applicant) v. Antinori Building Contractor Inc. (Respondent) (*Withdrawn*)

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1920-86-M: Local 787 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Sarnia Commercial & Industrial Refrigeration Ltd. (Respondent) (*Withdrawn*)

1934-86-M: The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 628 (Applicant) v. Copper Cliff Mechanical Contractors Limited (Respondent) (*Granted*)

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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
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0175-84-R The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 628, Applicant, v. **Abitibi-Price Inc.**, Respondent, v. Local Union 1565 - International Brotherhood of Electrical Workers, Intervener #1, v. Canadian Paperworkers Union, Locals 67, 40, 32, 109, 90, 132, 134, 133, 239, 249, Intervener #2, v. International Association of Machinists and Aerospace Workers, Thunder Bay Lodge 1120, Intervener #3

Certification - Construction Industry - Employer - Newsprint manufacturer using own work force to undertake construction project to improve quality of the newsprint - Whether employer operating a business in the construction industry

BEFORE: *N. B. Satterfield*, Vice-Chairman, and Board Members *J. A. Ronson* and *H. Kobryn*.

DECISION OF N. B. SATTERFIELD, VICE-CHAIRMAN, AND BOARD MEMBER H. KOBRYN; December 24, 1986

1. This application for certification was made under the construction industry provisions of the *Labour Relations Act*.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on May 14, 1982, the designated employee bargaining agency is the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada.

3. The applicant seeks to be certified for its normal construction trade bargaining unit of plumbers, steamfitters and their respective apprentices, including welders engaged in the plumbing and steamfitting trade. The geographic scope of the unit it has proposed is the Province of Ontario with respect to the industrial, commercial and institutional ("ICI") sector of the construction industry and in the Board's geographic area #22 with respect to all other sectors of the construction industry.

4. The applicant takes the position that the respondent operates a business in the construction industry and is an employer of employees engaged in construction work in the ICI sector of the construction industry. The respondent describes its business as manufacturing newsprint and contends that it does not operate a business in the construction industry and is not an employer of employees engaged in work in the ICI sector of the construction industry. In the alternative, should the Board find that the respondent operates a business in the construction industry, the respondent takes the position that its employees have performed the same or similar work for many years at its Mission Mill in Thunder Bay, Ontario, under the terms of its collective agreements with the intervener trade unions. Thus, were the Board to find the unit sought by the applicant to be appropriate, the application would constitute an attempt to carve out from the intervener trade unions' existing bargaining units a unit comprised solely of the applicant's normal trade. That circumstance raises the issue of whether there are employees who at the times material to this application, were engaged in construction work in the ICI sector in the respondent's other paper mills in Ontario.

5. The interveners Canadian Paperworkers Union, Locals 67, 40, 32, 109, 90, 132, 134, 133, 239, 249 ("the CPU"), International Association of Machinists and Aerospace Workers, Thunder Bay Lodge 1120 ("the IAM") and Local Union 1565 - International Brotherhood of Electrical Workers ("the IBEW") also take the position that, if the Board finds the respondent to be operating a business in the construction industry, they represent the respondent's employees who perform construction work and such work is covered by their respective collective agreements with the respondent. The CPU claims to represent plumbers and steamfitters, the IAM claims to represent welders and the IBEW claims to represent electricians.

6. This decision deals with the issue of whether the respondent operates a business in the construction industry. The question of whether it is an employer of employees engaged in construction work is implicit in the issue. The relevant sections of the Act are clause (f) of section 1(1) and clauses (b) and (c) of section 117. They provide as follows:

1.-(1) In this Act,

• • •

- (f) "construction industry" means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site thereof.

* * *

117. In this section and in sections 118 to 136,

• • •

- (b) "employee" includes an employee engaged in whole or in part in off-site work but who is commonly associated in his work or bargaining with on-site employees;
- (c) "employer" means a person who operates a business in the construction industry, and for purposes of an application for accreditation means an employer for whose employees a trade union or council of trade unions affected by the application has bargaining rights in a particular geographic area and sector or areas or sectors or parts thereof.

7. The applicant states in its application that the employees whom it seeks to represent are employed on the respondent's top wire former project at its Mission Mill in Thunder Bay, Ontario. The respondent operates two other paper mills in Thunder Bay and still others elsewhere in Ontario. The top wire former project ("the project") was comprised of four components. These were described by Norman Jones, who was assistant mechanical superintendent of the mill during the project, as being:

- (1) installing the top wire former on the Fordinaire system;
- (2) the warm water system;
- (3) the white water system; and
- (4) the hot water rolls of the calender stack.

The purpose of the project was to improve the finished quality of the newsprint produced on the mill's paper machine. Jones told the Board that he was advised by his superiors that the work would be undertaken directly by the respondent and not let out to contract. Mill management subsequently decided to hire extra tradesmen for the project because its regular employees were pri-

marily occupied by their regular tasks of keeping the mill operating 24 hours per day, seven days a week. While this application is concerned with plumbers, steamfitters and welders, the respondent hired other trades, including for example, millwrights and electricians, for work on the project.

8. The Board consistently describes an appropriate trade bargaining unit for the applicant and other local unions of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada in terms of plumbers and steamfitters (and their respective apprentices). The applicant and respondent, on the other hand, referred to persons working at this trade as “pipefitters”. For ease of reference, therefore, the Board will employ the term “pipefitter” in this decision when referring to the applicant’s trade. The term “welder”, unless the context requires otherwise, will be used in reference to persons employed as welders in the pipefitting trade.

9. Regular mill tradesmen began preliminary work on the project shortly prior to April 1, 1984. Pipefitters and welders were hired for the project at the beginning of April and this application was made April 17th. Pipefitters and welders hired for the project worked on it throughout its duration. The installation of the top wire former, the final phase of the project, began on September 4, 1984, when the papermaking process was shut down for 19 days for this purpose. The hired pipefitters and welders began work on the warm water and white water systems components of the project and were on that work when this application was made. The other two components of the project had not been started.

10. Jones told the Board that warm and white water are always involved in the papermaking process. White water is drawn off the process, stored and warm white water is reused at various stages of the process. If insufficient white water is available for reuse, from time to time it becomes necessary to introduce cold water which may cause the paper sheet to break. A break in the sheet causes a temporary shutdown in that part of the process with the attendant loss of production. Prior to April 1st, the mill had capacity for storing white water and reclaiming it for further use in the papermaking process. The purpose of the work on the warm and white water systems was to increase and improve the transportation and storage of white water, since one of the benefits of the top wire former project was to allow more white water to be drawn off the papermaking process than before as a result of a new foil system used jointly with the top wire former. The respondent adapted to this use existing storage facilities which had been used for other purposes. This phase of the project resulted in increased storage capacity for white water and a more efficient system of collecting, storing and returning warm white water.

11. In order for the respondent to be able to transport surplus white water to storage and back into the operation when needed, it was necessary to install new piping and pumps and rework existing piping. Jones estimated the piping for the warm and white water systems to represent 15 per cent of the total piping in the mill. The revised systems involved approximately 60 per cent new piping and 40 per cent original or reworked piping. Most of the piping work on the project was involved with its warm and white water components. David Brimmel’s evidence- in-chief for the applicant that there was over one mile of new piping installed was not seriously challenged. Gordon Carr, another pipefitter, and Rick Hyter, a welder, who testified for the applicant also worked on this phase of the project. The work included cutting out and removing existing pipe, replacing it with new or reconditioned pipe, re-routing piping systems and installing new piping systems. Connecting the piping and tying it into the vessels and equipment it supplied involved various kinds of welding.

12. Jones, who has been an employee of the respondent for 37 years and assistant mechanical superintendent for 10 years described a number of projects carried out in the mill during the

past five years by its own tradesmen, including its pipefitters and welders, which involved the installation of piping for various purposes including improving the efficiency of the mill and the quality of its products, the welding of pipe joints and the hooking up of the piping to pumps and other equipment. The work was carried out under the CPU and IAM collective agreements.

13. Respondent counsel's argument in support of the contention that the respondent does not operate a business in the construction industry was made in three parts. First, that the work being undertaken at the respondent's Mission Mill in Thunder Bay at the time material to this application is not work falling within the definition of construction industry in section 1(1)(f) of the Act when the words of the section are given a strict reading. Second, the work at issue is not construction industry work within the meaning of section 1(1)(f) if the Board examines the context in which the work in issue was performed, how work of a similar nature historically has been performed by the respondent and the industrial relations consequences of introducing building trades unions into the mill. Third, the respondent is not an employer in the construction industry within the definition of employer set out in section 117(c) of the Act.

14. With respect to the first branch of his argument, counsel submits that, in order for there to be construction, the work activity alleged to be construction must be done on "... buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges [and] canals...". Counsel submits that the work in issue is work which was directed to the respondent's paper machine and the systems which make up the papermaking process. Thus, the work was directed to the contents of the buildings which house that process and not the buildings themselves or any of the elements, like the air handling system, which are a fixed part of the buildings, or to any of the objects included in the definition. For that reason, the work activity was not directed to the objects described by any of the nouns employed in the definition of construction industry in section 1(1)(f) of the Act. Nor did the work activity consist of "...constructing, altering, decorating, repairing or demolishing...". Therefore the work activity in issue does not fit within that definition and is not construction work.

15. The second branch of respondent counsel's argument revolves around the distinction between repair work and maintenance work arising out of the reference to "repairing" in the section 1(1)(f) definition of construction industry, and the absence from it of the words "maintaining" or "maintenance". Counsel cited the Board's decision in *The Master Insulators' Association of Ontario Inc.*, [1980] OLRB Rep. Oct. 1477 as the authority for differentiating construction work (both new construction and repair) and maintenance work which is not construction. He points to paragraphs 28 and 29 of the decision quoted below as expressing the test for that differentiation:

28. With the exception of the work performed at the premises of Fearman and the work on a new emergency shower and minor work in a change house at Stelco, the work performed by the employers who were named in this complaint was essentially similar in nature. In our view, the work at the premises of Fearman, which involved an addition to an existing facility and involved both relocation of producing units and the expansion of existing capacity, was clearly new construction. Similarly, the work on the emergency shower and change house at Stelco was an addition for the safety and comfort of Stelco's employees and represented new construction. This work is clearly within the industrial, commercial and institutional sector of the construction industry. *The rest of the work referred to in the complaint was, for the most part, clearly work which sustained and maintained an operating facility and enabled that facility either to operate efficiently or to attain its designed or production capacity and is to be regarded as maintenance work. Maintenance work is to be distinguished from construction work which involves the addition to an existing facility or which will increase the designed or production capacity of an existing facility.* However, in so far as there was work of new construction, which was purportedly done under the maintenance agreement, it was a violation of section 134(a) of the Act.

29. Maintenance work performed by the employers who were named in this complaint is in real-

ity part and parcel of the production and maintenance operations of the industrial clients for whom the work is performed. These industrial clients may, and frequently do, perform their own maintenance work with their own employees who are included in their own industrial bargaining units. In the context of the work affected by this complaint “maintenance” is difficult to distinguish from “repair”. In our view, it is a question of the context of any given work and the degree of addition or subtraction of such work to an existing system or part of a system. *Where the work assists in preserving the functioning of a system or part of a system, such work is maintenance work. Where the work is necessary to restore a system or part of a system which has ceased to function or function economically, such work is repair work.* “Maintenance” and “repair” are not mutually exclusive concepts, and lack of adequate maintenance will surely produce a situation where repair becomes inevitable. In our view, the performance of adequate and timely maintenance forestalls or reduces the requirement for repair.

[emphasis added]

Relying on the emphasized passage in paragraph 28, counsel submits that the project at the Mission Mill did not increase either the designed or production capacity of the paper machine or the whole mill facility. The project’s purpose was to improve product quality, increase the storage and transportation capacity for warm and white water and reduce the amount of downtime on the paper machine. Therefore, it was work on the existing papermaking systems carried out for the purpose of maintaining and sustaining the mill facility. That, counsel argues, puts the work squarely within the type of work described as maintenance in paragraph 28 of the *Master Insulators’* decision. At the same time, counsel argues since the project work was not for the purpose of increasing the designed or production capacity of the mill, it does not fit the definition of construction work in paragraph 28 or of repair work which is in paragraph 29.

16. Furthermore, counsel’s argument continues, the Board recognized in *Master Insulators’*, *supra*, that “maintenance” and “repair” are not mutually exclusive concepts and that work alleged to be the one or the other had to be examined within the context in which it was performed. The context herein, counsel submits, is one of a long history of the respondent using its own maintenance forces at the Mission Mill to maintain the mill’s systems. Since the object of the work at issue here was to maintain the mill’s capacity and was being done by its own forces in the confines of the mill’s buildings, the Board should find it to be maintenance work. The fact that the Board has acknowledged that the context in which the work is being performed is important to deciding whether it is maintenance or repair calls for a case by case application of section 1(1)(f) of the Act. The respondent’s historical practice of performing the kind of work at issue with its own forces for the purpose of maintaining the mill’s productive capacity already was well established when the definition of construction industry was added to the Act. Therefore, in contextual terms, the Board has the latitude to find that such work is not captured by section 1(1)(f).

17. The final aspect of the second branch of counsel’s argument is that the Board must consider the labour relations impact of its decision. A decision that the work is construction would allow construction unions into the mill and, because of the overlap between what is “maintenance” and what is “repair”, would result in a flood of grievances over whether the work historically performed as maintenance was going to be performed under construction or industrial terms and conditions.

18. The third and last branch of respondent counsel’s argument is that the respondent is not an employer as defined by section 117(c) of the Act which states that “‘employer’ means a person who operates a business in the construction industry,...”. In order for an employer to satisfy that definition, two conditions must be met. First, the employer must operate a business. Second, the business must be operated in the construction industry. So the phrases “operates a business” and “in the construction industry” must be given meaning and, in the case of the latter phrase, the meaning must relate to the section 1(1)(f) definition of “construction industry”.

19. Counsel contends that the Board's jurisprudence dealing with the issue of whether an employer operates a business in the construction industry, beginning with *Top's Marina Motor Hotel*, [1964] OLRB Rep. Jan. 583, have failed to analyze and give meaning to those two phrases, particularly the phrase "operates a business". The fact that an employer is performing construction work does not satisfy section 117(c). The section requires more, counsel submits, and the more required is for the employer to be operating a business. That means that there must be a commercial purpose to the employer's performance of construction work in order for the employer to be brought within the meaning of section 117(c). Counsel views the *Tops Marina*, decision, *supra*, as coming narrowly within that definition because, at the time the application for certification was made, the only "business" being operated was the one of constructing a motel. Counsel reads the Board's decisions which have followed *Tops Marina* to have failed to give full meaning to the words "...operates a business in the construction industry..." because the Board has said there need not be a commercial purpose to the employer's performance of the construction work for that activity to constitute "operating a business". As a result of that interpretation by the Board of section 117(c), it has brought enterprises under the construction industry provisions of the Act which are not in the construction business. That stretches unreasonably the meaning of the words "...operates a business in the construction industry...", and that would be the result on the facts of the instant case were the Board to find that the respondent, by performing work on the Mission Mill's existing buildings, equipment and production systems which make up the paper machine, is operating a business in the construction industry. The respondent is in the papermaking business, that is the only business which it operates and the work at issue herein, even if found to be construction work, is and has always been an integral part of its papermaking business. That business is machinery intensive and requires on-going maintenance and upgrading of its equipment and processes. Therefore, when the respondent is engaged in on-going maintenance and upgrading work, it is engaged in the papermaking process, not construction. Thus, it is not operating a business in the construction industry when it is performing that work.

20. Finally, counsel submits that the entire structure of the *Labour Relations Act* supports his interpretation of what "...operates a business in the construction industry..." means in section 117(c). The special provisions for the construction industry contained in sections 117 through 151 of the Act are an attempt to recognize and deal with differences in the different bargaining environments of the construction industry and non-construction: different job skills, different economics and different problems. The Board's interpretation of what is "construction" seems to ignore that structure of the Act by bringing under the construction industry provisions non-construction enterprises to which the general provisions of the Act apply. One result is to bring employers who are not in construction business under the highly structured and centralized provincial bargaining regime of the Act when they have no commercial interest in construction. That result alone is sufficient reason, counsel contends, for the Board to re-evaluate its interpretation of section 117(c) enunciated in the *Tops Marina* line of cases because they pre-date the province-wide bargaining provisions of the Act. For the respondent, another result of the Board's interpretation of section 117(c), could be separate bargaining units of construction trades such as pipefitters, millwrights, electricians, carpenters, etc., all working on the same paper machine. That result would be contrary to the Board's policy that it is desirable to avoid fragmenting the representation of employees.

21. Counsel for the CPU and the IAM focused their arguments primarily on the Board's jurisprudence which interprets the definition of "construction industry" in section 1(1)(f) of the Act. Mr. Moore for the IBEW was concerned from the outset mainly with findings the Board would be called upon to make respecting whether the work affected by the application was work in the construction industry and whether the Board's findings would impinge upon how its collective agreements with the respondent and the Electrical Contractors Association of Ontario defined

maintenance and construction work. He was satisfied that any findings the Board might make in this case would not have an adverse precedential impact on the IBEW's interests.

22. CPU counsel divided the Board's decisions, exclusive of the *Master Insulators'* decision, *supra*, dealing with sections 1(1)(f) and 117(c) into two groups: the cases where there is no history of any bargaining relationship between parties to the dispute; and, the cases where there has been a tri-partite, pre-existing arrangement amongst the parties respecting the work in question. The first group is made up of the *Tops Marina* line of cases where the threshold issue was whether the employer operated a business in the construction industry. The second group is composed of two subgroups. One subgroup is made up of decisions arising out of requests for a cease and desist order where there were allegations of a selective strike under the province-wide bargaining provisions of the Act. The other subgroup is made up of applications for certification under the construction industry provisions of the Act by building trades unions seeking to represent employees of municipal employers where those employers already were in a collective bargaining relationship with another trade union.

23. CPU counsel's analysis of the *Tops Marina* group of cases is that none of them were decided in the context of a pre-existing bargaining relationship. The applications were made in circumstances where no other trade union claimed to have bargaining rights for any of the employees affected by the application. Thus, they readily may be distinguished from the instant case on the different context in which they were decided. Moreover, the *Tops Marina* decision, *supra*, the first Board decision to deal with the Act's definition of construction industry, was the only decision in the group to deal with the distinction between maintenance work and construction work. That is another reason why the Board should not rely on the other cases in the group. The Board's recognition in *Tops Marina*, *supra*, of that distinction is in its declaration that carpenters who might be engaged for maintenance work on the motel once it was in operation, would not be employees in the "construction" unit of carpenters which the Board had found to be appropriate for collective bargaining. That is relevant to the instant case, counsel submits, because if the Board finds that the work in issue herein is maintenance work, it would not be construction industry work pursuant to section 1(1)(f). That would be sufficient to dispose of the application.

24. With respect to those cases in the second group arising out of requests for cease and desist orders, counsel argues that they are distinguished from this case by two important elements. In almost all of these cases, according to counsel, the parties to the application were involved in bargaining relationships flowing from the construction industry provisions of the Act. They had historically treated the work which was the subject of the applications as work to be performed under construction industry conditions. In other words, there was a pre-existing consensus that the work was construction work. The applications were brought when the parties entered into an arrangement to perform it as maintenance work, departing from their historical treatment of the work. There is no similar history in this case of the respondent having treated the work in issue as construction work. Those differences in context provide sufficient reason for the Board not to rely on this group of cases.

25. Counsel acknowledges that the Board's decisions in the second group which involve building trades unions and municipal employers are marginally relevant to the instant case, but only insofar as the Board's interpretation of sections 1(1)(f) and 117(c) were made in the context of an application for certification. Counsel claims, however, that the facts of these cases do not disclose any pre-existing bargaining relationship respecting the work in dispute. Furthermore, in some decisions involving a third party intervener, the facts show there to be a pre-existing relationship between the employer and the applicant to have the applicant's members perform the work in issue under construction industry conditions, all made possible by some appropriate arrangement

between the employer and the trade union intervener. By way of example, counsel cited three Board decisions from this subgroup as supporting his analysis: *The Corporation of the City of Toronto*, [1978] OLRB Rep. Dec. 1145; *The Municipality of Metropolitan Toronto*, [1980] OLRB Rep. Jan. 62; and *The Board of Education for the City of Windsor*, [1983] OLRB Rep. May 831.

26. Counsel submits that, for all of those reasons, the instant case differs significantly from the cases in both groups and leaves the Board with the tests set out in paragraphs 28 and 29 of its *Master Insulators*' decision, *supra*. He also adopts respondent counsel's argument that the evidence before the Board does not support a conclusion that the work in issue is either new construction or repair within the meaning of section 1(1)(f) as the Board has interpreted it in *Master Insulators*. Counsel argues further that the *Master Insulators*' decision recognizes that there is no bright line test for distinguishing work which is repair, therefore construction, from maintenance and therefore not construction. It is fundamental, therefore, for the Board to have particular regard to the fact that the work in issue is functionally similar to work historically performed by the respondent with mill forces under collective agreements with the three interveners; it was the respondent's intention from the beginning to perform the work in accordance with the existing collective agreements; and the work was performed within the confines of the existing mill facility without increasing the designed or production capacity of the facility, or the purpose of its existing operating systems.

27. Thus, counsel contends, there was a pre-existing arrangement for the work to be performed under existing collective agreements, within a pre-existing bargaining relationship, for the purpose of maintaining and sustaining the mill processes. Even if the Board should ultimately find that the pattern of bargaining between the respondent and interveners did not capture the work in question, when deciding whether the work was work in the construction industry or something else, it is open to the Board to conclude that the parties themselves have recognized a demarcation line between maintenance work and construction industry work. Therefore, just as the Board refused, in the cease and desist subgroup of cases referred to above, to define as maintenance work the same kind of work which the parties previously had treated as construction work within the context of an established construction industry bargaining pattern, by analogy with those cases, the Board reasonably could apply the *Master Insulators*' test for maintenance work and conclude that the work in issue is not construction work. In doing so, the Board simply would be recognizing that this particular respondent, within this particular industry, papermaking, and the three interveners have treated the work in issue as maintenance work within the context of their pre-existing bargaining relationships. Such a conclusion would leave their bargaining relationships undisturbed and would avoid the disruption which inevitably would occur, according to counsel, if the applicant and other building trades unions were injected into the bargaining relationship. This was by way of reference to problems to which respondent counsel had alluded respecting the potential for grievances and work jurisdiction disputes, if work which the parties have historically treated as maintenance work must be done under construction industry collective agreements, by employees represented by building trades unions.

28. IAM counsel's review of the evidence and Board decisions generally supports the arguments advanced by CPU counsel, but he asked the Board to have particular regard to the potential disruption of the collective bargaining relationships that would result from a finding that the work in issue is work in the construction industry as defined in section 1(1)(f) of the Act. At least half a dozen of the trades represented by the interveners at the Mission Mill have their counterparts in the building trades. Therefore, if the Board finds the work in issue to be work in the construction industry and, as a result, the applicant gains bargaining rights for pipefitters and welders doing construction work, it could lead to the whole bargaining system at the Mission Mill unravelling. Where, as here, the applicant has the onus of proving that the work in issue is work in the con-

struction industry and the respondent operates a business in the construction industry, and where there is no clear demarcation between maintenance work and construction, it is particularly appropriate for the Board to consider the impact of its ultimate determination on existing bargaining relationships at the mill.

29. The Board will deal first with the argument that the work in issue does not fit within the literal meaning of the definition of construction industry in section 1(1)(f) of the Act. The relevant facts are that the work being performed by the employees affected by this application, at the times material to it being filed with the Board, involved the warm and white water systems of the paper-making process at the respondent's Mission Mill. The work involved, generally, such things as disconnecting and removing pipe, installing pipe and connecting it to existing piping systems, existing and new pumps, storage vessels and other equipment. There is no doubt that the piping, pumps, storage vessels and other equipment were affixed to the buildings which are part of the mill. Thus they are a part of the building housing them and are to be considered part of the land. In this respect see the Board's decision in *Arcan Eastern Ltd.* [1969] OLRB Rep. Apr. 141 at paragraphs 5 and 6, and *M. G. Burke Investments Limited*, Board File No. 0640-76-R, an unreported decision which issued February 28, 1977.

30. The Board was dealing in the latter decision, with certain work performed by electricians and electricians' apprentices. It adopted the conclusion made in paragraph 6 of the *Arcan*, *supra*, decision that "... where an article is affixed to the land even slightly, such article is to be considered as part of the land." in finding at paragraph 22 that some of the electricians and apprentices "...were engaged in performing work as employees of the respondent within the construction industry.". The Board made that finding after commenting as follows upon the work at paragraphs 20 and 21:

20. With regard to the first principal issue, the work of the electricians and electricians' apprentices involves the installation of wiring which is evidently attached to the various buildings, such as the Woolworth's store and the Star Bottling plant. Their work also involved the installation of lighting in a private residence and running and strapping an electrical conduit. In addition, there were repairs to lights and electrical systems. It appears to the Board and we so find that the lighting systems, wiring and conduits are attached to buildings or structures. With respect to the repair of machinery and a belt on a conveyor it is not clear whether these items are attached to buildings or structures and accordingly the Board is not prepared to find that work on these items is work on fixtures rather than chattels.

21. For the guidance of the parties the Board sets forth two general considerations concerning whether certain objects become fixtures or remain as chattels. Where an article is affixed to the land even slightly, such article is to be considered as part of the land. The onus of establishing that a given article is intended to remain as a chattel rather than a fixture lies on the party which contends that it is a chattel. See *Holland v. Hodgson* (1872) L.R. 7 C.P. 328, 335; *Bain v. Brand* (1876) 1 App. cas. 762; *Haggert v. Brampton* (1897) 28 S.C.R. 174; and *Stack v. T. Eaton Co.* (1902) 4 O.L.R. 335, 1 O.W.R. 511. In addition, for a discussion of what constitutes a fixture, chattels which do not become fixtures and chattels which do not become fixtures [sic] - see Williams', *The Canadian Law of Landlord and Tenant* (1973), pps 573-580. In this regard see also DiCastri, *The Law of Vendor and Purchaser* (1976), pps 21-22.

31. The Board finds, therefore, that the work being done in the instant case is being done to at least one of the objects, "buildings", of the work activity described in section 1(1)(f). The pipefitters were installing new piping; taking out existing piping, reworking and installing it; tying in new and reworked piping to existing piping systems and to new and existing pumps and other equipment, all in the nature of fixtures. To the extent that "constructing" includes "fitting together", the pipefitters were engaged in constructing piping systems which became part of the respondent's buildings. Therefore, the installation of the piping systems which were part of the warm and

white water components of the project is work which would fall within the meaning of "...constructing... buildings..." in section 1(1)(f) of the Act.

32. The respondent and interveners contend that the work in issue is not "constructing" because, on the facts, it is work which satisfies the definition of maintenance as set out in paragraph 28 of *The Master Insulators'* decision, *supra*, and does not satisfy its definition of construction work. According to those parties, that is because it was work done to an existing facility to sustain and maintain it and enable it to operate efficiently and not work which involved an addition to the mill or which increased its designed or production capacity. The Board agrees that the project, and in particular, its warm and white water components, was not an addition to the mill in the sense that adding a second paper machine, or adding equipment that would increase the tonnage per shift would be. But that does not remove the work in issue from the realm of what might be construction and place it within the realm of what is maintenance. If maintenance work is to be defined by the purpose of sustaining and maintaining an existing facility, the purpose of the project goes well beyond sustaining and maintaining the mill's papermaking operations. Its purpose is to improve the quality of newsprint produced by its paper machine. The purpose or object of the warm and white water components of the project is to improve and increase the transportation and storage capacity for warm and white water so as to realize the additional benefit of being able to draw off more warm and white water from the papermaking process. In turn, having more warm and white water available for use in the process will reduce the risk of lost production (i.e., the amount of downtime) because of breaks in the paper sheet. That is why those phases of the project were undertaken and any sustaining or maintaining of the papermaking process resulting from the project work is incidental to that purpose.

33. Even so, would it be reasonable for the Board to conclude that the work is maintenance work, when viewed in the context of the respondent's long history of having performed work which is functionally similar to the work in question, using its own mill forces represented by the interveners and working under the terms and conditions of their collective agreements and within the confines of the existing mill facility? The Board agrees with CPU counsel that the jurisprudence does not recognize a bright line test. The Board's analysis of the distinction between repair and maintenance in *Master Insulators'*, *supra*, begins with the following observation at paragraph 21:

The distinction between "maintenance" and "repair" in the construction industry is not one which is easily made. While section 1(1)(f) of the Act defines "construction industry" and refers to "repairing", the words "maintenance" and "maintaining" do not appear in the Act...

Paragraph 22 of the decision acknowledges that the Board has regarded maintenance as not included in the section 1(1)(f) definition of construction industry. In spite of that acknowledgement, the Board's uncertainty about what is maintenance and therefore not construction is demonstrated by these further references in paragraph 22 to some of the Board's authorities on the issue:

...[I]n *The Board of Governors of The University of Western Ontario* case, [1970] OLRB Rep. Oct. 776, the Board determined that the employer was not operating a business in the construction industry because the employees who were the subject of an application for certification were engaged in maintenance rather than repair. In the *Overhead Door Co. of Toronto Ltd.* case, [1974] OLRB Rep. July 482, the Board examined the business of an employer who was engaged in the sale, distribution, installation, maintenance and warranty of various types of wood and metal doors and concluded that *whether "maintenance" is to be considered as part of "construction industry" depends on the type of "maintenance" being performed and on the context of a given employer's operations.*

[emphasis added]

The following extract from paragraph 29 of the *Master Insulators'* decision quoted above reveals

similar difficulty on the part of the Board in that case in making the distinction between maintenance and repair:

29. Maintenance work performed by the employers who were named in this complaint is in reality part and parcel of the production and maintenance operations of the industrial clients for whom the work is performed. These industrial clients may, and frequently do, perform their own maintenance work with their own employees who are included in their own industrial bargaining units. *In the context of the work affected by this complaint "maintenance" is difficult to distinguish from "repair".*

• • •

[emphasis added]

Nor is it necessary to look any further than the last two quotations to find support for the claim of counsel for the respondent, CPU and IAM that the context in which the work is done is significant in deciding whether the work falls within the section 1(1)(f) definition. The emphasized passages show the Board to have considered context to be an important factor.

34. The facts about the work in the *Master Insulators'* case which the Board found to be maintenance are that it involved the removal and replacement of insulating material on pipes, vessels and equipment in various industrial plants operated by clients of the contractors who were the employers of the persons doing the work. It was "part and parcel" of the production and maintenance operations of the clients and the kind of work which the clients frequently performed with their own forces. That was the context in which the Board found the work to be that which would sustain and maintain the clients' facilities, therefore maintenance and not work which was needed "...to restore a system or part of a system which has ceased to function or function economically,...", and therefore repair. In the instant case, while the work is being performed by the respondent's own mill forces on its own equipment and has been described by the respondent and interveners as essential to the maintenance and upgrading of the papermaking systems of the mill, therefore, part and parcel of the papermaking process, the evidence does not support a conclusion that the work is being done to sustain and maintain the mill's systems. Rather, the evidence is that it was being done to improve the quality of the newsprint, to increase the transportation and storage capacity of warm and white water and to reduce downtime. That is a substantial addition to these components of the mill's paper machine. In this respect, it is interesting to note the view of the Board expressed at paragraph 29 of the *Master Insulators'* decision, *supra*, when it was discussing its dilemma of trying to distinguish maintenance and repair in the context of the work in evidence therein:

...it is a question of the context of any given work and the degree of addition or subtraction of such work to an existing system or part of an existing system.

While the Board was concerned there with trying to distinguish repair and maintenance, that view applies equally well to distinguishing maintenance from other types of work incorporated by the section 1(1)(f) definition of construction industry. In our view, the work performed on the warm and white water systems of the paper machine is an addition to those systems which goes significantly beyond preserving their functioning. That result is not altered merely because the parties themselves, in the past, may have treated functionally similar work as maintenance rather than construction.

35 The arguments respecting the potential for more grievances, more disputes over work assignment and greater fragmentation of bargaining rights is irrelevant to a question of whether the work in question is work in the construction industry within the meaning of section 1(1)(f) of the Act. They may or may not be relevant to other matters in the ultimate disposition of the appli-

cation. The work is either maintenance work of a kind which, having regard for the nature of the work and the context in which it was being performed, should not be considered construction even though the definition of construction industry does not explicitly exclude maintenance, or it is construction work and not maintenance work at all. Either result would not change because the impact of deciding the question one way or another might create a greater potential for the type of problem argued.

36. The Board is not persuaded by the arguments of CPU counsel that, in deciding whether the work is maintenance or construction, the Board should distinguish the *Tops Marina* line of cases because they were not decided in a context of pre-existing bargaining rights, and that the Board could find the work in question to be maintenance within the principles of the *Master Insulators'* decision because the respondent and interveners historically have treated it as maintenance. Those arguments might well apply, however, in the context of the issue as to whether the bargaining rights presently held by the interveners and the collective agreements containing those rights include the employees who perform the kind of work at issue.

37. Having regard to all of the foregoing, the Board finds that the work of removing old piping and installing new or reconditioned pipe, all of which is attached to the land, and connecting that piping to other existing piping, pumps, new and existing, and vessels for the purpose of improving and increasing the transportation and storage capacity of the warm and white water systems of the mill's papermaking process is constructing and altering buildings within the meaning of section 1(1)(f) of the Act. Therefore, it is work in the construction industry.

38. It remains, therefore, to decide the issue which the parties have framed as "whether the respondent operates a business in the construction industry". The issue for the Board is more correctly framed as whether the respondent is an employer within the meaning of section 117(c) of the Act. Since the section defines "employer" as a person who operates a business in the construction industry, the definition of "construction industry" in section 1(1)(f) is brought into play. Therefore, the issue becomes one of whether the respondent operates a business "... that [is] engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipelines, tunnels, bridges, canals or other works at the site thereof.". In this respect, see the Board's decision in *Cedarhurst Paving Co. Limited*, [1964] OLRB Rep. Dec. 442 at p. 443. One of the questions to be decided by the Board in that case was whether the respondent fell within the definition of employer which is now part of section 117(c); that is "'employer' means a person who operates a business in the construction industry.". The Board, having noted previously that it was dealing "...only with one aspect of the construction industry, namely, the construction, alteration and repair of roads ...", went on to state that, in order to be an employer within that definition, the respondent "...must operate a business which is engaged in constructing, altering or repairing roads..." (emphasis added).

39. The Board has just found the work being performed by the respondent's employees who are affected by this application to be work coming within the section 1(1)(f) definition of construction industry. It is undisputed that the respondent operates a business. In the Board's view, when that business includes the employment of employees to perform work coming within the definition of construction industry, the business is engaged in the construction industry. The Board finds, therefore, that the respondent was a business engaged in constructing and altering buildings at the times material to this application. It follows, then, that the respondent was operating a business in the construction industry within the meaning of section 117(c) and, therefore, is an employer within the meaning of that section.

40. That is what the Board has said in its decision in *Tops Marina*, *supra*, and many of the

cases which have followed it. The Board disagrees with respondent counsel's contention that, in those decisions, the Board has failed to give full meaning to the words in section 117(c) "...operates a business in the construction industry...". That failure, counsel argues, stems from the fact the Board has held that there need be no commercial purpose to an employer's performance of the construction work. To the extent that intending to make a profit is "commercial purpose", it would be correct to say that the Board has held it to be unnecessary for there to be a commercial purpose to the operation of a venture for it to be a business. (*Kapuskasing Board of Education*, [1972] OLRB Rep. June 587, at paragraph 4). The Board has also said that to be operating a business that is engaged in construction does not require that the work be done for others rather than for the particular employer's own purposes, or that the "construction" business be the primary or predominant business of the employer (*Tops Marina, supra*); or the "general nature" of the employer's business (*Loblaw Groceries Co., Limited*, [1969] OLRB Rep. June 392). That decision has particular relevance for the instant case. Loblaw's employed construction trades to carry out alterations and renovations to its stores in Ontario. The Board acknowledged that the general nature of Loblaw's business was the operation of retail supermarkets, but found that there was an "alteration and renovation" aspect to its business. That caused the Board to conclude that Loblaw's was engaged in the construction industry as it is defined by the Act. By analogy, it may be said in the instant case that the general nature of the respondent's business is papermaking, but there is a construction and alteration aspect to it as well. While that aspect of the respondent's business may be an integral part of its papermaking business, as counsel argues it to be, that does not change the fact that the respondent operates a business which, in part at least, is engaged in construction. The Board has also found that being a municipal corporation rather than a business corporation does not preclude an employer from being a "business" engaged in construction work (*The Municipality of Metropolitan Toronto*, [1980] OLRB Rep. Jan. 62). It is implicit in that holding of the Board that it does not see an object of making a profit to be an essential criterion of a "business" in sections 1(1)(f) and 117(c). In that case, in the process of finding the municipality to be an employer, the Board rejected the argument that the word "business" used in sections 1(1)(f) and 117(c) did not include municipal corporations. The Board stated at paragraph 31 that "...[t]he special provisions [of the Act] with respect to the construction industry which were enacted in 1962 neither limit their application to any particular sector of the construction industry nor exclude specific classes of employers such as municipal corporations."

41. Clearly, the Board has not failed to give full meaning to the words "...operates a business in the construction industry..." in section 117(c). It may not have given the narrower meaning contended by respondent counsel, but it is clear from all of the cases starting with *Tops Marina*, the Board has given a very broad meaning to the word "business". The Board seems to be retrospectively approving having done so in the following comments at paragraph 34 of its decision in *Metropolitan Toronto, supra*:

...As the Board stated in the *Tops Marina Motor Hotel* case, *supra*, it is not necessary that the business of an employer in the construction industry is the predominant or primary business. The soundness of that position has become clear over the years when the Board considers the number of large construction projects which have been accomplished by owner-builders and developers...

[emphasis added]

42. Further support is found for the broad meaning given by the Board to the word "business" in the following passage from the Board's decision in *The Board of Trustees of the Roman Catholic Separate Schools for the City of Windsor*, [1966] OLRB Rep. Mar. 920, a proceeding under what is now section 63 of the Act, quoted at paragraph 34 of the *Metropolitan Toronto* decision, *supra*:

In the instant case, the term "business" should be given that interpretation most consistent with the other provisions of *The Labour Relations Act* and which will best effect the purposes of that section of the Act in which the term appears. It should be borne in mind that the Act does not distinguish between public and private business, and contemplates the existence of bargaining rights held by trade unions with respect to 'employers' generally and not simply those engaged in commercial enterprises. Nothing in the Act would suggest that any limitation on the continuance of these bargaining rights should be imposed by virtue of the non-commercial nature of any employer's 'business'. The term 'business' as it appears in *The Labour Relations Act*, therefore, ought not to be qualified by the addition of the adjective 'commercial', but should rather be read as referring generally to the *undertaking* of any employer whose operations are subject to this Act.

[emphasis added]

43. Respondent counsel argues that the Board should re-evaluate its interpretation of sections 1(1)(f) and 117(c) because that interpretation ignores the special provisions for the construction industry in sections 117 through 151 of the Act, and their purpose, one result of which has been to bring under those provisions employers who have no commercial interest in construction. That has had the effect of bringing them under what counsel describes as "the highly structured and centralized bargaining regime of the Act". In the Board's view, had the Legislature intended a narrower interpretation of those sections of the statute, there has been ample opportunity since the *Tops Marina* decision in 1964 for the Legislature to have expressed that intention. There have been three major amendments to the construction industry provisions of the Act since then, all directed to a broader based, more structured regime of collective bargaining. There was the introduction of accreditation of employers' organizations in the 1970 amendments to the Act; the introduction of single trade, province-wide bargaining in the industrial, commercial and institutional sector of the construction industry in the 1977 amendments; and the province-wide extension of employee bargaining rights in that sector in the 1980 amendments to the Act. When all of those amendments were enacted by the Legislature, it was well aware of the kinds of employers which were being found by the Board to be operating businesses engaged in the construction industry. Yet the Legislature did not seek to amend the definitions of "employer" or "construction industry" so as to exclude any particular class of employer. This, in spite of the fact the province-wide bargaining regime was designed to apply only to employers of employees for whom particular kinds of trade unions had bargaining rights, to those unions and to those employees within those limits, the same classes of employers which the Board in the past has found to be operating a business in the construction industry, can be part of the provincial bargaining scheme of the Act. Had the Legislature not wanted to include those kinds of employers within that scheme, knowing how the Board had interpreted sections 1(1)(f) and 117(c), it would have amended the sections or made some other provisions so as to exclude them from access to the scheme. It did not do so. It is not unreasonable, therefore, to infer that the Board's interpretations have met the statutory purpose intended by the Legislature for the construction industry provisions of the Act.

44. Having regard to all of the foregoing, the Board finds that, as at the date of making of this application, the respondent was operating a business that was engaged in constructing and altering buildings and, therefore, is an employer within the meaning of section 117(c) of the *Labour Relations Act*. It follows therefrom that the pipefitters and welders employed by the respondent in its construction work on the date of this application are employees within the meaning of section 117(b) of the Act. Since the applicant is a trade union which pertains to the construction industry within the meaning of section 117(f), the application satisfies the conditions precedent for being an application for certification within the meaning of section 119 of the Act. Thus the applicant is entitled to a craft bargaining unit pursuant to section 6(2) of the Act, subject to the requirements of section 144(1) of the Act.

45. Before this application can be finally determined, it is necessary to decide the claim of the respondent, the CPU and the IAM that the work in issue is work which has historically been performed by the mill forces under the terms of the CPU and the IAM collective agreements with the respondent. It is also necessary to decide whether, on the date of making of the application, the respondent employed pipefitters and welders (in the pipefitting trade) on ICI construction elsewhere in the Province of Ontario. Therefore, the Registrar is directed to list the application for hearing for the purpose of receiving the evidence and representations of the parties on the two foregoing and any other outstanding matters.

DECISION OF BOARD MEMBER J. A. RONSON;

1. In their decision my colleagues have concisely and accurately set out the facts and argument of this case. I disagree with them as to whether the respondent employer is engaged in business in the construction industry. Since my findings on that aspect are determinative, I have not dealt with the other arguments raised by the respondent and the interveners, and should not be taken to either agree or disagree with my colleagues with respect to any other issue.

2. This case is really the first in which the Board has had to decide whether an industrial or manufacturing business is also a “business in the construction industry”. If my colleagues are correct in their reasoning, then at one time or another, practically every “business” in Ontario can form part of the “construction industry”. For example, suppose I wish to partition my basement to create an office from which I will conduct business as, say, a labour relations consultant. Suppose I employ a carpenter and a labourer to do the partitioning. Accordingly, I would be an “employer” carrying on “business in the construction industry”.

3. To me, the word “business” implicitly means an activity whose object is to make a gain or profit. Over the years the Board has expanded the meaning of the word “business” as found in section 1(1)(f) and section 117(c) of the Act so as to include “enterprises” whose activities need not have a profit-making objective. (For example, *The Board of Trustees of the Roman Catholic Separate Schools for the City of Windsor*, [1966] OLRB Rep. Mar. 920, and *The Municipality of Metropolitan Toronto*, [1980] OLRB Rep. Jan. 62). In those cases the Board was dealing with public bodies whose major reason for existence was to oversee the construction and maintenance of public works. That the Legislature would not be concerned with this expanded definition in relation to public bodies is not surprising.

4. It seems to me that the Board’s definition focuses unduly on whether the work is construction work and completely ignores the use of the word “business”. Construction work, standing alone, is not the test. Those drafting the Act were very careful and precise in their choice of words. The Act does not say “‘employer’ means a person who does construction work”; - it says “‘employer’ means a person who operates a *business* in the construction *industry*.” The Act does not say “‘construction industry’ means the persons who are engaged in constructing ...”; it says “‘construction industry’ means the *businesses* that are engaged in constructing...”.

5. No one can deny that the respondent is a “person” and a “business” in the papermaking industry. To my mind there was no intention on the part of the Legislature to say that a person in the papermaking industry was also engaged in a “*habitual occupation*, profession, trade or *serious work*” in the construction industry, (the definition of business in the *Concise Oxford Dictionary* with my emphasis). The respondent does not derive profit or gain from construction work *per se*. Construction work is not its serious work. It spends capital or capitalized profit to construct things to make paper for profit.

6. I would hold that an employer in the construction industry is a "person" whose business, habitual occupation or stated trade is to construct, alter, decorate, repair or demolish.... If construction is but necessarily incidental to the business of a person, then that person cannot be an employer in the construction industry within the meaning of the Act.

7. The respondent's business is to make paper. It is part of the papermaking industry. It is not an employer to whom the construction industry provisions of the Act apply.

0037-85-U; 0039-85-OH; 0446-85-U; 0819-86-FC Toronto Typographical Union, Local 91, Complainant, v. **Burlington Northern Air Freight (Canada) Ltd.**, Respondent; Rick Best, Complainant, v. **Burlington Northern Air Freight (Canada) Ltd.**, Respondent; Toronto Typographical Union, Local 91, Applicant, v. **Burlington Northern Air Freight (Canada) Ltd.**, Respondent

Duty to Bargain in Good Faith - First Contract Arbitration - Health and Safety - Lock-out - Unfair Labour Practice - Suspension of union activist for contacting health and safety inspector breach of OHSA and motivated by anti-union animus - Surface bargaining breach of duty to bargain in good faith - Lock-out motivated by desire to punish employees for exercising statutory rights unlawful - Pervasive pattern of unfair labour practices one reason Board considers relevant under s.40a(2)(d) in directing settlement of first collective agreement - Union and employees awarded compensation for losses during lock-out and damages for breach of duty to bargain in good faith

BEFORE: Robert D. Howe, Vice-Chairman and Board Members I. M. Stamp and B. L. Armstrong.

APPEARANCES: Nelson Roland, B. Cox-Graham, Douglas W. Grey and Joe Bibeau for the complainants and the applicant in File Nos. 0037-85-U, 0039-85-OH, and 0446-85-U; M. Cornish, Nelson Roland, Susan Bazilli, Douglas W. Grey and Joe Bibeau for the applicant in File No. 0819-86-FC; D. L. Brisbin, J. Drake and William Machika for the respondent.

DECISION OF ROBERT D. HOWE, VICE-CHAIRMAN, AND BOARD MEMBER B. L. ARMSTRONG; December 19, 1986

1. File No. 0037-85-U is a complaint under section 89 of the *Labour Relations Act* in which the Toronto Typographical Union, Local 91 (also referred to in this decision as the "Union" and as "Local 91") alleges that the respondent, Burlington Northern Air Freight (Canada) Ltd. (also referred to in this decision as "Burlington" and as the "Company"), has contravened sections 3, 15, 64, 66, 67, 70, and 79 of the Act. File No. 0039-85-OH is a complaint by Rick Best against Burlington under section 24 of the *Occupational Health and Safety Act* (the "O.H.S.A."). File No. 0046-85-U is an application by the Union for relief under section 93 of the Act.

2. Those three matters were consolidated by the Board on June 5, 1985 through the following oral ruling:

Having considered the submissions of counsel, we have concluded that this is an appropriate case in which to consolidate the three files (0037-85-U, 0039-

85-OH, and 0446-85-U) and to call upon the complainants to proceed first with their evidence on all aspects of the consolidated proceedings which, although they include a number of allegations to which section 89(5) clearly applies, also include a number of significant allegations to which section 89(5) may not apply, such as the allegations that the Employer has bargained in bad faith and has attempted to undermine the Union by dealing directly with bargaining unit employees. In this regard, we would also note that section 89(5) does not apply to the Union's section 93 application. With respect to the additional allegations contained in Union counsel's letters of May 29 and June 3, 1985 which did not reach counsel for the Employer until the day before this hearing, we are not prepared to dismiss them as requested by counsel for the Employer, as we are of the view that all of the complainants' allegations should be heard together in a single consolidated proceeding. However, we are prepared to grant counsel's request for an adjournment in order to afford him an adequate opportunity to consult with his client in respect of those additional allegations and prepare a defence. Whether compensation should be awarded for the period of the adjournment is a matter which may be addressed in final argument, for decision by the Board on the basis of all of the circumstances. Union counsel has indicated that he may wish to file some further allegations after speaking with bargaining unit employees. Whether the Board will permit the complaint to be amended to include such further allegations is not a matter for decision in the abstract; it can only properly be decided in light of the nature of the allegations and the time at which the Union, through the exercise of due diligence, should reasonably have become aware of them. However, it would be in no one's interest to have a further adjournment of this matter so we trust that Union counsel will proceed with dispatch in investigating and filing any further allegations concerning events which have occurred to date.

3. At the request of the respondent and with the encouragement of the Board, counsel for the Union filed with the Board on July 17, 1985 a "comprehensive list of complaints", which incorporated all of the allegations contained in the aforementioned application and complaints (with the exception of certain allegations that had been withdrawn by the Union with leave of the Board) and all of the additional allegations contained in Union counsel's letters of April 4, May 23, May 27, May 29, June 3, June 4, June 12, and July 4, 1985. When the hearing of these consolidated matters resumed on July 24, 1985, counsel for the respondent did not object to the inclusion of any of those allegations, with the exception of certain allegations concerning non-payment of vacation pay following the commencement of the lock-out described later in this decision. After hearing the brief submissions of counsel concerning that matter, the Board ruled that the allegations in question were properly before the Board, and that the matter of the remedy, if any, to be awarded in the event that they were proven was a matter for final argument.

4. The hearing of these consolidated matters on their merits commenced on July 24, 1985, and continued on September 16 and 25, October 24, and December 18 and 19, 1985, and on January 7, 8, 9, and 20, April 7, 10, and 28, May 8 and 26, and June 5, 10, 11, 12, and 17, 1986. During those twenty days of hearing the Board heard oral evidence from twelve witnesses and received fifty-two exhibits. (Included in those exhibits were collective agreements that had been entered into by Burlington Northern Air Freight Inc., which is the respondent's parent company, and two-Teamsters' locals, in respect of some of the parent company's employees in Minneapolis/St. Paul and Dallas/Forth Worth. (Those agreements were obtained by Local 91 through union channels and were received by the Board, over the objection of Company counsel, pursuant to our discre-

tion under section 15(1) of the *Statutory Powers Procedures Act*. However, we have not found those agreements to be of assistance in adjudicating these matters and, accordingly, have not given them any weight.) On the agreement of the parties, we also took a view of the respondent's premises to assist us in better understanding the evidence. We do not propose to detail that voluminous evidence in this decision. However, we have included in this decision our factual and legal conclusions, together with comments, where appropriate, concerning the credibility of particular witnesses. In making our findings of fact, we have carefully considered all of the oral and documentary evidence, the submissions of the parties concerning that evidence, and such factors as the firmness of the witnesses' respective memories, their ability to resist the influence of self-interest to modify their recollections, the consistency of their evidence, their capacity to express their recollections clearly, and their demeanour. We have also assessed what is most probable in the circumstances of the case, and what inferences may reasonably be drawn from the totality of the evidence.

5. File No. 0819-86-FC is an application under section 40a of the Act for a direction that a first collective agreement be settled by arbitration. That application was filed by the Union on June 20, 1986, and was heard by this panel of the Board on July 8, 1986. In a decision dated July 10, 1986 regarding that application, we wrote as follows:

1. This is an application under section 40a of the *Labour Relations Act* for a direction that a first collective agreement be settled by arbitration.

2. At the commencement of the hearing of this matter, the parties advised the Board through their counsel that they had agreed that all of the evidence which has been adduced before this panel of the Board in hearings with respect to Board File Nos. 0037-85-U, 0039-85-OH, and 0446-85-U, and the submissions of the parties in those proceedings, should be applied to the instant application. After advising the Board of certain additional facts on which they had agreed, counsel proceeded to present their submissions concerning this application.

3. Having regard to the aforementioned evidence, agreed facts, and submissions of the parties, the Board, pursuant to section 40a(2) of the *Labour Relations Act*, hereby directs the settlement of a first collective agreement between the applicant and the respondent by arbitration. Our reasons for this decision will issue at a later date.

The Board's reasons for directing the settlement by arbitration of a first collective agreement between the Union and the Company will be included in this decision. (This panel of the Board subsequently arbitrated that collective agreement in a decision dated October 1, 1986, in File No. 1223-86-FCA, now reported at [1986] OLRB Rep. Oct. 1327.)

6. Burlington is a wholly owned subsidiary of Burlington Northern Air Freight Inc. Prior to becoming a wholly owned subsidiary of that American corporation, it was operated as a joint-venture of Burlington Northern Air Freight Inc. (also referred to in this decision as the "parent company") and Airgo Agency Limited ("Airgo"). Burlington provides "door to door" transportation service in the highly competitive air express and air freight forwarding industry. Burlington's Toronto terminal (also referred to in this decision as the "station") is located near the Lester B. Pearson International Airport (the "Airport"). It ships to and receives from points throughout the world, but most of its volume comes from the U.S.A. and the Toronto area, for distribution throughout Canada. Included in the Toronto terminal is a distribution department in which bulk shipments from major customers such as I.B.M. and Hewlett-Packard are broken down and forwarded to various addresses. Jim Drake was the Managing Director of Burlington from 1983 until

February of 1986 (when he commenced employment with a competitor). He commenced employment with Burlington in 1978 as its Regional Manager for Canada, and subsequently became its Vice-President and General Manager. William Machika, the Company's Director of Service for Canada, reported directly to Mr. Drake at all material times.

7. The Union began to organize the Company's warehouse employees in July of 1984. Other unions had attempted to organize the warehouse employees in previous years but had not succeeded. During his cross-examination of Mr. Drake on May 8, 1986, Union counsel sought to question that witness about concessions which were allegedly given to employees in 1983 to stave off an attempt at unionization by another union. In upholding Company counsel's objection to that line of questioning, the Board ruled that the evidence which the Union was attempting to adduce with respect to that matter fell within the scope of section 72 of the Board's Rules of Procedure in that it involved allegations of "improper or irregular conduct" that had not been particularized, and "material fact[s] that had not been included in the ... complaint or in any document filed ... in respect of the complaint." In view of the stage of the proceedings at which the matter arose, and in view of the fact that Union counsel had already had an ample opportunity to particularize all of the allegations of improper and irregular conduct on which his client intended to rely, we unanimously declined to consent to such evidence being adduced, in the exercise of our discretion under section 72(2) and 72(4) of the Rules. In so ruling, we also expressed concern that to embark upon an enquiry into unparticularized events which might have occurred during previous organizing drives might well unduly expand the length of these already protracted proceedings.

8. The person in charge of the Union's organizing drive in respect of the warehouse employees of Burlington's Toronto terminal was Joe Bigeau. Mr. Bigeau is the Vice-President of Local 91 and is also an International Organizer assigned to that local. Prior to assuming those positions, Mr. Bigeau was a representative of Teamsters Local 419. In that capacity he had negotiated approximately twenty collective agreements. After being contacted by Roy Burns, one of the respondent's two lead hands, Mr. Bigeau met with about a dozen Burlington employees at a hotel. Although Mr. Burns left the meeting early due to another commitment, the other employees remained and decided to proceed with an attempt to unionize. During the course of that meeting, Mr. Bigeau gave a number of (unsigned) Union membership cards to Rick Best, a driver/warehouseman who commenced employment with the Company in 1981. Mr. Best used those cards to sign up a number of Burlington's Toronto warehouse employees as Union members.

9. A major source of discontent among the employees, and one of the primary reasons they felt the need for union representation, was the fact that in addition to approximately fifteen full-time employees who worked five eight-hour days per week, the Company had approximately fifteen other employees, who prior to certification were referred to as "part-time employees", but subsequently came to be called "permanent irregular employees" by the Company. Many of those employees worked between thirty and forty hours per week (and sometimes more), but did not receive the benefits (such as O.H.I.P., life insurance, dental, optical, and pension plan coverage) that were provided at Company expense to full-time employees.

10. On August 6, 1984, Mr. Best, who was employed on the day shift, attended at the warehouse with two other day shift employees for approximately an hour to speak with evening shift employees about the benefits of unionization. On the following day, Mr. Best and the other two employees were given letters advising them that the Company would not in the future tolerate their being on Company premises while off shift. Copies of those letters were posted on the Company bulletin board for the information of other employees. Similar conduct by persons circulating a petition in opposition to the Union did not attract any disciplinary action.

11. The Union filed an application for certification on August 8, 1984. On September 6, Mr. Machika wrote to the Union as follows:

Dear Sirs:

It is our company policy to review all newly hired staff within three months of employment and once again on their first anniversary with the company.

In reviewing our personnel files, we find that on some employees hired between February and the transmittal date (August 17th) missed their three month and yearly reviews [sic].

As this could be misconstrued as a change in working conditions, we would appreciate your concurrence with reviewing these employees at this time.

If no response is received on the above within 10 days, we will proceed with these reviews.

On September 17, Douglas Grey, the President of Local 91, responded to that letter by advising Mr. Machika in writing that the Union concurred with his request to proceed with Burlington's three-month and yearly reviews. However, as noted below, the Company did not do so.

12. The Union was certified by the Board, differently constituted, on November 15, 1984 (in an unreported decision in File No. 1198-84-R) for the following bargaining unit:

all employees of the respondent in the Municipality of Peel, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.

13. When it received notice from the Board of the Union's application for certification in August of 1984, the respondent, by virtue of section 79(2) of the Act, became legally obligated to refrain from altering terms and conditions of employment, and any rights or privileges of the employees, without the consent of the Union. As indicated later in this decision, following certification the Union gave Burlington notice to bargain under section 14 of the Act. Thus, the aforementioned obligation continued under section 79(1) until early May of 1985. In *A E S Data Limited*, [1979] OLRB Rep. May 368, the Board summarized the purpose and effect of the 'freeze' imposed by those provisions as follows:

10. The purpose of section 70 [now section 79] is to maintain the prior pattern of the employment relationship, in its entirety, while the parties are negotiating for a collective agreement. This ensures that they will have a fixed basis from which to begin negotiations, and prevents unilateral alterations in the status quo which might give one party an unfair advantage either from the point of view of bargaining or of propaganda. The status quo includes not only the existing terms and conditions of employment but also any other established benefits which the employees are accustomed to receive, and which can therefore be considered to be "privileges." It is clear that express promises, or a consistent pattern of employer conduct, can give rise to such privileges and that they are caught by the statutory freeze. It should be noted, however, that section 70 also freezes the "rights and privileges" of the employer. The section requires both parties to maintain the existing pattern of their relationship; that is, to conduct their business as before. In *Spar Aerospace Products Limited*, [1978] OLRB Rep. Oct. 859, the Board discussed the effect of section 70 in the following way:

the "business as before" approach does not mean that an employer cannot continue to manage its operation. What it does mean is, simply, that an employer must continue to run the operation according to the pattern established before the circumstances giving rise to the freeze have occurred, providing a clearly identifiable point of departure for bargaining and eliminating the chilling effect that a withdrawal of expected benefits would have upon the representation of the employees by a trade

union. The right to manage is maintained, qualified only by the condition that the operation be managed as before. Such a condition, in our view, cannot be regarded as unduly onerous in light of the fact that it is management which is in the best position to know whether it is in fact carrying out business as before. This is an approach, moreover, that cuts both ways, in some cases preserving an entrenched employer right and in other cases preserving an established employee benefit.

(See also *K-Mart Canada Limited*, [1982] OLRB Rep. Jan. 64, and the decisions cited in that case.) More recently, the Board has also found it appropriate to consider the reasonable expectations of employees in determining rights and privileges which are frozen by section 79: see, for example, *W. H. Smith Canada Ltd.*, [1986] OLRB Rep. June 920; *Forintek Canada Corp.*, [1986] OLRB Rep. Apr. 453 and *Simpsons Limited*, [1985] OLRB Rep. Apr. 594. A finding of anti-union motivation is not essential in the context of section 79 as it is a strict liability provision.

14. Prior to the certification of the Union, the Company had an established practice respecting bi-annual shift bids. In the early spring and late fall of each year, the Company posted all of the full-time positions in the warehouse by classification and shift. That posting would remain up for a week, during which employees could fill in their choices. The week after the posting was taken down, employees would be assigned on the basis of seniority to the shifts which they had chosen. Following certification, the shift bids were not posted at the normal time. After employees complained to management about the matter, the shift bids were posted two or three weeks later. The posting remained up for two weeks instead of the usual one-week period. Although employees filled in their choices, the Company left the employees on their existing shifts and did not honour their shift bids. Following further complaints to various levels of management, employees were ultimately told by Paul Evans, Burlington's Toronto Station Manager, that the shift bids had been suspended because they would be a point of contention in negotiations with the Union. When Ian Taylor, the lead hand on the night shift, told Mr. Evans that the Company's position "did not make sense because, negotiations or no negotiations, you've still got to have shifts", Mr. Evans replied, "Well, that's the way it is."

15. In his testimony before the Board, Mr. Machika offered the following reason for the Company's post-certification failure to follow its established practice regarding shift bids: "Because we'd heard from members of the unit of [their] wanting changes in the shift bid system - wanting fixed shifts - we couldn't do the shift bids and then negotiate and have to change mid-stream." In view of management's assertion (described below) that "negotiations take an awful long time", that explanation does not strike us as being entirely candid. In any event, it provides no defence to what is clearly a contravention of section 79 of the Act.

16. Burlington further contravened section 79 by withholding the employees' annual pay increase in November of 1984. Prior to 1982, increases had been given to employees on their individual employment anniversary dates. However, in November of 1982, all of the employees in the warehouse were given a raise and Messrs. Machika and Evans advised them that in future years they would receive an increase every November. In accordance with that arrangement, another wage increase was given to the warehouse employees in November of 1983. However, no such increase was forthcoming in November of 1984. Employee complaints about that matter merely yielded the answer from management that wage increases had been suspended because they were a matter for negotiation with the Union. After initially telling the Board that to the best of his knowledge there had been a wage increase in November of 1984, Mr. Drake changed his evidence by indicating that hourly-rated employees were not given their annual wage increase that year "on the advice of counsel in the U.S. ... that this would be one of the items on the bargaining table". Although wages are certainly one of the matters which have traditionally formed a significant part of collective bargaining, that well known fact does not relieve an employer of the obligation under

section 79 to provide a wage increase at the expected time where an annual increase at a particular time of year has become a term or condition of employment, or a right or privilege of employees, through previous statements or actions by management: see, for example, *Homewood Sanitarium of Guelph, Ontario Ltd.*, [1982] OLRB Rep. Feb. 230; *Ottawa General Hospital*, [1981] OLRB Rep. Oct. 1461; *The Corporation of the Town of Meaford*, [1981] OLRB Rep. Sept. 1202; and *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859. Having been advised by Messrs. Machika and Evans in November of 1982, in conjunction with a wage increase, that in future years they would receive a wage increase every November, and having received such an increase in November of 1983, employees would reasonably expect that a further wage increase would be given in November of 1984. In the absence of consent by the Union to that increase being withheld pending negotiations, the respondent's failure to provide it contravened section 79.

17. Some probationary employees were also denied the wage increase that had traditionally been given to probationary employees at the time of their "ninety day review" at the conclusion of their probationary period (in the event that management decided to retain them as employees). When Mr. Taylor, complained to Mr. Drake and to Peter Kaye, the Night Warehouse Supervisor, about that matter on behalf of Stephen Rupert and James Brown, two employees on the night shift who had successfully completed their probationary period but had not received a wage increase, he was told that because of the negotiations with the Union, there could be no raises. In adopting that position, the respondent was again following the advice of the Vice-President and Legal Counsel of Burlington's parent company, and was again contravening section 79 of the Act.

18. The Company also breached section 79 by changing its practice regarding uniforms following certification. Prior to certification, Burlington had an established practice of supplying eleven sets of uniforms (consisting of pants and long sleeved shirts) to each non-probationary full-time employee, and seven sets of uniforms to each non-probationary part-time employee. Those uniforms were provided by Unitog Canada Ltd. pursuant to a rental contract with Burlington. An employee would normally be measured shortly after completion of the probationary period, and the supply of uniforms would commence about two weeks later. The cleaning and repairing of those uniforms had also traditionally been provided under that contract at no expense to Burlington's employees. Following the application for certification, new employees were not provided with any uniforms by the Company following their probationary period. In response to employee complaints about that matter, management indicated that no further uniforms would be supplied as "uniforms would be part of the demands during negotiations". James Brown, for example, commenced employment with Burlington in September of 1984. At the time of his hire he was told by Mr. Kaye that he would be given a review after three months of employment, and that if his performance was found to be satisfactory, he would be given a raise at that time and would also be provided with uniforms. When that three-month probationary period passed without a review, a salary increase, or the provision of any uniforms, Mr. Brown raised the matter with Mr. Kaye. After consulting with Naida Maynard, the station's Night Operations Manager, Mr. Kaye told Mr. Brown that the performance reviews, salary increases, and uniforms were "on a freeze" because the Union had been voted in. Mr. Brown received a similar response when he raised the matter with Frank Castelino, the respondent's Service Supervisor. Mr. Brown was measured for uniforms about a week after he spoke with Mr. Castelino. However, no uniforms had been provided to him by January 8, 1986 when he testified before the Board in these proceedings (and there is no evidence that they were subsequently provided to him). Mr. Machika testified that uniforms were not ordered for new employees following certification because the Company did not want to enter into any further uniform rental commitments in case the negotiations with the Union called for changes respecting uniforms. However, the Company did not seek the Union's consent to that change in the Company's practice regarding uniforms.

19. The Company also had an established policy of subsidizing the purchase of safety boots by paying fifty percent of the cost of one pair of steel-toed work boots per year, to a maximum of forty dollars per employee. To facilitate the provision of those boots, the Company traditionally arranged for a safety boot truck to come to the station twice a year. Following certification, the truck did not come at its normal time. However, after receiving complaints by employees, management arranged for the truck to come to the station a few weeks later and further arranged for the respondent to subsidize the cost of boots purchased as a result of that visit, in accordance with its usual practice. It is unnecessary to determine whether the late arrival of the safety boot truck involved a contravention of section 79, as no remedial relief would be warranted under the circumstances.

20. The Company had developed a practice of giving employees profit-sharing bonuses twice a year during periods of profitability. Prior to 1983, the bonuses took the form of monetary payments. Mr. Taylor, for example, received \$250 for the period from January to June of 1982 and \$150 for the period from July to December of 1982; in earlier years his bonuses had varied from about \$50 to \$500. Four other employees, including Rick Best, received \$150 for January to June of 1982, and \$50 for the following six-month period. Others received smaller amounts. In 1983 there was less money available, so management decided to give warehouse employees wine and cheese in December instead of a monetary bonus. In 1984, money was once again available for distribution. Mr. Drake told the Board that while it was engaged in a joint-venture with Airgo, the parent company had accepted Airgo's policy of distributing profit-sharing bonuses throughout the employee ranks, but that having become the sole owner of the respondent, the parent company had directed management to follow the parent company's policy of not paying profit-sharing bonuses to hourly-rated employees. However, it is clear from the evidence that no such change in policy had been communicated to employees prior to the certification of the Union. Moreover, notwithstanding that assertion by Mr. Drake, we are satisfied on the totality of the evidence before us in these proceedings that, but for the certification of the applicant, bargaining unit employees would have received a profit-sharing bonus prior to the end of 1984. In this regard, we accept the candid and credible evidence of Mr. Taylor that when Mr. Drake telephoned him on the day that the Union was certified by the Board, one of the things that Mr. Drake told him was that the bonus cheques were sitting on the desk, signed and ready to go, but that they were not going out. Although in his testimony before the Board Mr. Drake denied having made that statement, we found him to be a less reliable witness than Mr. Taylor, whose evidence we prefer concerning that matter (and most other matters on which their evidence conflicts). In making that finding of fact, we have also considered the circumstances in which that telephone call was made, and the nature of the pre-existing relationship between Mr. Drake and Mr. Taylor. Mr. Drake had known Mr. Taylor for a number of years as they had both commenced employment at about the same time with the Airgo joint-venture which had preceded the parent company's complete ownership of the respondent. Mr. Drake found Mr. Taylor to be an outgoing and engaging person. He had visited Mr. Drake's home in 1983 when he purchased a motor vehicle from Mr. Drake. Mr. Taylor was the sole witness to testify before the Board in the certification proceedings in support of the petition which he had circulated in opposition to the Union. Thus, Mr. Drake saw Mr. Taylor as an ally in his opposition to the Union, and had no idea that he was speaking with an individual who would subsequently become a member of the Union's bargaining committee and one of the Union's strongest supporters. Mr. Drake called Mr. Taylor at home that day to advise him of the Board's decision, so that Mr. Taylor would know before he went to work that the Union had been certified. Mr. Drake also wanted to assure Mr. Taylor that he was a "valued employee" and that the Company would "try to make sure that there'd be no recriminations against him" for having circulated a petition against the Union.

21. During that telephone conversation, Mr. Drake also told Mr. Taylor that the certifica-

tion of the Union was unfortunate and that it "put things in a whole new ball game" in which "all things are off". When Mr. Taylor asked him what he meant, Mr. Drake repeated, "All things are off." That prompted Mr. Taylor to express the view that it was not fair for Mr. Drake to treat the employees that way, as there were "a lot of employees who worked very hard for the Company, who signed the petition, and who didn't want the Union". Mr. Drake agreed that it was unfortunate, but added, "That's the way things are." He also asked Mr. Taylor, "Do the men realize that negotiations take an awful long time?"

22. Having regard to the totality of the evidence and, in particular, to the aforementioned statements by Mr. Drake during his telephone conversation with Mr. Taylor on the day the Union was certified, we find that the respondent contravened section 66 of the Act by withholding the bonuses which it had planned to provide to its warehouse employees, thereby discriminating against them and penalizing them for having exercised their rights under the Act to join a trade union. In view of that finding, it is unnecessary to determine whether the respondent also contravened section 79 by withholding those bonus cheques.

23. During the second week of December, the following (typewritten) petition was placed on the Station Manager's desk after working hours:

TO WHOM IT MAY CONCERN:

WHY:-

INQUIRY-NO NOVEMBER RAISES AS AGREED TO IN THE PAST

PROFIT SHARING OR BONUS FOR WHOSE STAFF

NO SHIFT BIDS HONOURED

IF BY 3:30 P.M. DEC/14/84, NO REPLY IS RECEIVED, A COPY OF THIS
INQUIRY, WILL BE FORWARDED TO THE LABOUR BOARD

That petition contained the signatures of about a dozen warehouse employees, below whose signatures was typed: "THESE SIGNATURES REPRESENT THE OPINION OF ALL THE EMPLOYEES." Photocopies of two pages of the Act were attached to that petition, with sections 79(1) and 96(1)(b) circled.

24. Mr. Machika replied to that petition by means of the following memo:

To: Toronto Warehouse Employees

From: Wm. E. Machika

Date: December 17, 1984

Subject: Petition

Once the Labour Board has certified a Union as the representative of a group of employees, the employer is required to deal *exclusively* with the Union regarding the terms and conditions of employment of those employees.

25. The Company also contravened section 79, as well as sections 64, 66, and 70 of the Act by changing its approach to discipline following the application for certification. Prior to becoming

aware of the Union's organizational activities, management had generally only taken disciplinary action against employees for serious matters such as violence, insubordination, habitual tardiness, and substantially inadequate job performance. Matters of a more minor nature were usually dealt with through oral warnings. Moreover, employees were generally given an opportunity to give management "their side of the story" before being given a written warning or other discipline. After receiving notice of the Union's certification application, management began to issue written warnings for a variety of "violations", including relatively trivial matters which would not have attracted any disciplinary response prior to certification. A printed "EMPLOYER WARNING RECORD" was introduced by the Company and was used extensively by management in a transparent attempt to punish employees for having unionized, and to intimidate or coerce them into refraining from further exercising their rights under the Act. Many of those documents were prepared in typewritten form prior to any discussion with the affected employees concerning the incidents to which they pertained. Moreover, members of management generally remained steadfast in their determination to include them in the employees' files even if the employees offered a reasonable explanation for the impugned conduct. Bargaining unit employees adversely affected by the respondent's unfair labour practices described in this paragraph included Mark Wells, Brian MacDonald, James Brown, and Dale Robertson. In particular, having carefully considered the extensive evidence adduced by the parties concerning various incidents which attracted disciplinary action following the certification of the Union, we are satisfied that the respondent contravened sections 64, 66, 70, and 79 by giving a written warning to Mr. Wells on February 6, 1985, by giving written warnings to Mr. MacDonald and Mr. Brown on March 13, 1985, by giving a written warning to Dale Robertson on March 14, 1985, by giving written warnings to Mr. MacDonald and Mr. Robertson on April 30, 1985, and by suspending Mr. Robertson for two days on May 1, 1985. However, we find that the respondent did not contravene the Act by giving written warnings to Mr. Robertson on December 3, 1984, and January 14, 1985, as we are satisfied on the totality of the evidence that the misconduct which gave rise to those two written warnings would have attracted disciplinary action prior to the onset of the statutory "freeze", and we are further satisfied that the respondent was not motivated by anti-union considerations in issuing them.

26. Following the Union's application for certification, the Company also violated sections 64, 66, 70, and 79 of the Act by using its disciplinary powers for the purpose of building a record against Mr. Best, who was known by management to have been instrumental in organizing the employees. With the exception of the aforementioned warning letter which he received in the summer of 1984 for being on Company premises while off shift (which letter may well itself have constituted an instance of discipline motivated by anti-union animus), Mr. Best had received no written warnings or suspensions, and very few oral warnings, prior to the application for certification. However, the situation changed dramatically after the Company became aware of his Union activities. The change began with the aforementioned warning letter. It continued in the fall of 1984 and in the ensuing winter and spring. On October 17, 1984, Mr. Best was given a written warning for a "violation" which was described as follows on the warning form: "Failure to advise supervision of an odorous [sic] piece of frt. That [sic] was in the rack and at the same time reporting to Customs in order to create an issue out of the matter." It is clear from the evidence that this warning was completely unwarranted and it can reasonably be inferred from the totality of the evidence that the members of management involved in issuing that warning knew it to be unwarranted. The freight in question contained brussel sprouts which had gone bad. Mr. Best had in fact advised his supervisor of the presence of that malodorous piece of freight on several occasions. Moreover, Mr. Best did not report the matter to Customs or attempt to create an issue out of the matter. When a Customs Officer, who was in the warehouse clearing freight for shipment, asked Mr. Best about the smell, he merely took her to the freight in question and said, "Why don't you clear it so that we can ship it out of here?" Mr. Best testified that the clearing of freight was the Customs Officer's job, and that international freight cannot be shipped out of the warehouse without first being

cleared by Customs. He also told the Board, "I thought I was doing the Company a favour by trying to get rid of this smelly freight."

27. On February 1, 1985 Mr. Castelino gave Mr. Best a memo concerning absenteeism, in which he noted that Mr. Best had called in sick on five of the twenty-two working days in January, and requested him to do his part in helping the Company to resolve this "problem". That memo was forwarded to Mr. Best and placed in his personnel file, notwithstanding the fact that members of management were aware from their personal observation of Mr. Best that he was quite ill in January. Indeed, at one of the bargaining sessions held during that month, Mr. Machika told Mr. Best, whose eyes were watering and whose sickness was so severe that he was unable to talk, not to come near him. Mr. Best was also told by a member of management that he should be home in bed. He took that advice and remained at home in bed for the next two days. Mr. Best was also absent from work due to illness two days in February and two days in March. On March 26, 1985, Mr. Castelino suspended Mr. Best for three working days for what he characterized as "abuse" of the Company's sick leave policy "by the taking of compensated time off under the guise of illness or injury". Mr. Castelino was not called as a witness in these proceedings, nor was any other credible evidence adduced to demonstrate that management had any *bona fide* reason to believe that Mr. Best had abused the Company's sick leave policy. Moreover, although management was aware of sick leave abuse in 1984, which was the worst year for absenteeism in Company history, no employee was suspended for such abuse in 1984. Thus, even if Mr. Best's absences had involved an abuse of the Company's sick leave policy (which they did not), the suspension of Mr. Best for such abuse would have involved a departure from the Company's pre-certification approach to such matters. The same is true of Burlington's two-day suspension of D. J. Simec on March 26, 1986. However, the "absenteeism" memo dated March 27, 1985 from Mr. Castelino to Richard Schepens, which was also impugned by the Union in these proceedings, was not a written warning and did not involve any contravention of the Act.

28. Following certification, Mr. Best was also denied the privilege of using Company telephones for personal telephone calls. Prior to certification, Mr. Best (and other warehouse employees) had been permitted to make and receive such calls, subject only to not abusing the privilege by, for example, making long distance calls or using the Company telephone number in an advertisement for the sale of personal property. There is no evidence of any such abuse by Mr. Best. Moreover, the Union did not consent to the withdrawal of that privilege, nor to the alteration of any of the terms and conditions of employment described above. By revoking that pre-existing privilege, the respondent contravened section 79 of the Act, as well as section 66.

29. Following its certification by the Board, the Union gave Burlington notice to bargain and arranged to meet with Company representatives on January 4, 1985. The persons present at that meeting on behalf of the Union were Messrs. Bigeau, Taylor, and Best. Mr. Taylor and Mr. Best had been elected as members of the Union bargaining committee by employees in the bargaining unit. The Union also intended to have Mr. Grey present at that meeting as the Union's chief spokesperson, but he was unable to attend as he was called away to a meeting in the United States. Thus, Mr. Bigeau served as the Union's spokesperson at that meeting. The persons present on behalf of the Company included Mr. Machika, Mr. Evans and Barbara Crosby, a labour lawyer who served as the Company's chief spokesperson. At that meeting, the Union presented all of its bargaining proposals, with the exception of its wage proposals, which Mr. Bigeau indicated would be forthcoming at a later date. The proposals included a union security clause which made membership in the Union a condition of employment; a provision which precluded supervisors (and other persons outside the bargaining unit) from performing work normally performed by members of the bargaining unit; a prohibition against contracting out any such work; a clause which made seniority the determining factor in lay-offs, promotions, transfers, overtime assignments, and

recalls (provided the senior employee had the ability to perform the work); a clause which prevented the Company from hiring a part-time employee where there had been a decrease in the number of full-time positions, and which required the Company to lay off all part-time employees before it could layoff any full-time employees, and to follow the reverse order in recalling employees; and an article which provided for standardized shifts of eight hours per day on five consecutive days, with a daily half hour unpaid lunch period. The standardized hours proposed by the Union were 7:30 a.m. to 4:00 p.m. for the "first shift" and 4:00 p.m. to 12:30 a.m. for the "second shift". Although it was not clear from the Union's initial proposal, it was the Union's position that all existing health and welfare benefits should be extended to all employees in the bargaining unit. In addition to provisions concerning recognition, transfer of operations, grievance procedure, representation by Union stewards, job posting, and seniority, the Union proposed some vacation, statutory holiday, shift premium, and safety boot subsidization improvements, as well as a Christmas bonus of one week's pay for each employee. The Union also proposed that the Company contribute to the "ITU Negotiated Pension Plan", and that it preserve practices, privileges, benefits, and working conditions to the extent that they were more beneficial than those contained in the collective agreement. A "general" article contained a number of provisions, including an obligation to provide uniforms to employees "in accordance with current practice", and to strike all reprimands from an employee's record after one year.

30. During the January 4 meeting, Ms. Crosby commented that the Union's monetary demands were outrageous, and that the Union was obviously not used to dealing with Burlington's type of operation. Mr. Bigeau found Ms. Crosby's comment about "monetary demands" to be rather strange, in that the Union had not yet tabled its monetary proposals. However, he was not unduly concerned about her comments, as he was of the view that Ms. Crosby was "just putting on a show" for her client. Mr. Bigeau answered the Company's questions about a number of the proposals. However, he indicated that the Company would have to wait for information from Mr. Grey concerning the initiation fee specified in Local 91's bylaws (which fee was included in the Union's checkoff proposal) and concerning the ITU Negotiated Pension Plan. When Mr. Bigeau raised the employees' concerns about the Company's failure to follow its usual practices concerning such matters as shift bids and uniforms for new employees, the Company's response was that those items would be negotiated.

31. A second bargaining meeting was held on January 16, 1985. Mr. Grey attended that meeting along with the other three aforementioned members of the Union bargaining committee. The only change in the Company bargaining committee was that Jose Cordeiros, Burlington's National Operations Manager, was present instead of Mr. Evans. (Mr. Machika told the Board that the Company decided to rotate Messrs. Evans and Cordeiros as members of the Committee so that either of them could be used as a replacement in the event that Mr. Machika was unable to attend. However, that did not occur as Mr. Machika was present at all of the bargaining sessions.) At that meeting, the Company provided the Union with copies of its proposals. Those proposals were formulated, with the assistance of counsel, by Messrs. Drake and Machika with input from Don Hogan, the Company's Director of Sales, and Mary Hauer, the Company's Director of Finance and Administration. On the advice of the Company's Toronto counsel, and of the Vice-President and Legal Counsel of the parent company, Mr. Drake decided not to go to the bargaining table. He told the Board that he decided not to take part in the day-to-day negotiations so that any decision he might make would not be biased by the heated discussions which sometimes take place in negotiations. However, he kept abreast of the negotiations by meeting with Mr. Machika after each negotiation session and reviewing typed transcripts of Mr. Machika's notes, which were also forwarded to the Vice-President and Legal Counsel of the parent company in California. Mr. Machika, who had little collective bargaining experience, took written notes at each bargaining session and then dictated them after each session so that they could be typed and distributed to Mr.

Drake, Mr. Evans, Mr. Cordeiros, and the Vice-President and Legal Counsel of the parent company. Mr. Machika had the authority to make "house cleaning changes" in the Company's proposals, but could not make any substantive changes without Mr. Drake's approval.

32. Burlington's proposals contained numerous provisions which were of serious concern to the members of the Union bargaining committee. Article 2.03 divided the bargaining unit into "two types of employees" defined as follows:

- 1) *permanent regular employees*: an employee who is employed by the Company working a regular shift comprised of five (5), eight (8) hour days for a regular non-over-time work week of forty (40) hours.
- 2) *permanent irregular employees*: an employee who is employed by the Company working an irregular shift which is any shift other than a regular work shift as defined in Article 2.03(1).

Since those terms were both entirely new, the Union bargaining committee spent much of that second bargaining session attempting to gain some understanding of what they meant and what their implications were for members of the bargaining unit. The Company indicated at the bargaining table that permanent irregular employees were "part-time employees" who worked only 25 to 30 hours per week and did not receive benefits. However, the information available to the Union through Messrs. Taylor and Best indicated that some of them worked 35 or more hours a week. In explaining the creation of that new terminology, Mr. Drake testified: "We really had two labels for employees: full-time and part-time. We had to revise the use of 'part-time' because of the [Board's] bargaining unit description of less than twenty-four hours per week. Therefore, we had to create a classification of employees who were scheduled to work more than twenty-four hours per week but less than forty hours per week. That's where the 'regular', 'irregular' classifications came from." He also told the Board that permanent irregular employees had various schedules, depending on the staffing requirements dictated by the "many peaks and valleys" in the air freight forwarding industry.

33. The Union representatives felt, and expressed to the Company, grave concern that Burlington's proposals provided no job security for members of the bargaining unit. The Union was extremely concerned about the fact that the proposals would empower Burlington to seriously erode the Union's bargaining rights by reducing permanent regular employees to permanent irregular employment, and then further reducing their hours of work to less than twenty-four hours per week, thereby removing them from the bargaining unit. Their concern in that regard was heightened by the lack of any guaranteed hours for even a core of permanent regular employees, and the fact that the Company proposals included broad powers to revise starting times, lengths of shifts, and hours of work, and to subcontract work and lay off bargaining unit employees while retaining part-time employees (excluded from the bargaining unit.)

34. Certain actions that were taken by management following certification also heightened the Union's anxiety about the implications of the Company's proposals. In mid December of 1984, the Company eliminated a driver's position and a warehouseman's position on the day shift. The two employees whose positions were eliminated bumped two other employees with less seniority. One of them (Allen Proulx) bumped a warehouseman (Dale Robertson), who was then demoted from "full-time" employment (with full benefits) to "part-time" employment. Following his demotion, he worked between 35 and 40 hours per week without benefits. (No employees were laid off as a result of that change, because two low seniority employees left the employ of the Company the week before the change.) Furthermore, the Company reduced Robert Miller and Dan Poutsoungas to 24 hours of work per week. Prior to that reduction, those two warehouse workers had each generally averaged approximately 32 hours of work per week for Burlington. (They were initially

hired by Burlington in late September of 1984 as temporary employees, to assist the warehouse staff in handling a large volume of automotive promotional material which required distribution on behalf of one of the Company's customers. However, following a four-day lay-off at the end of November, they were called back to work because they were needed to help unload trucks.) When Mr. Taylor, who was their lead hand, complained to Mr. Evans about that reduction, which had made it more difficult for Mr. Taylor and the others on his shift to complete all the necessary work, Mr. Evans confirmed Mr. Taylor's suspicion that their hours had been reduced "because of the Union", so as to remove them from the bargaining unit. (Mr. Miller subsequently returned to the bargaining unit when his supervisor arranged for him to obtain more hours of work with the Company by switching hours with his brother Steven, who had another job in addition to his position with Burlington.)

35. In reducing the hours of work of Mr. Miller and Mr. Poutsoungas "because of the Union", the respondent contravened sections 64 and 66 of the Act. The same is true of Mr. Robertson's demotion, which was also motivated at least in part by anti-union considerations. Under the circumstances, it is unnecessary to determine whether those actions were also violative of section 79.

36. On the basis of those and other actions by management following certification, the Union representatives were concerned that unless a collective agreement prevented such actions by the Company, bargaining unit positions might be reduced or eliminated by replacing permanent regular employees with permanent irregular employees, and reducing the hours of permanent irregular employees to twenty-four hours per week (or less). The Union representatives' concerns about that possibility were further heightened by the fact that the Company was unwilling to guarantee forty hours of work per week for any of the permanent regular employees, unwilling to agree to maintain a fixed ratio of permanent regular employees to permanent irregular employees, and unwilling to agree that part-time employees would be laid off prior to members of the bargaining unit.

37. The members of the Union bargaining committee were also of the view that there was no justification for denying full benefits to the workers described by the Company as permanent irregular employees, in view of the fact that many of them worked nearly the same number of hours as the workers described by the Company as permanent regular employees. They also feared that in the absence of a provision guaranteeing a forty-hour work week for at least those employees who had traditionally worked five, eight-hour days for Burlington, the Company might deprive such employees of their existing benefits by reducing or varying their working hours so as to remove them from the ambit of the "permanent regular employee" definition. However, the Company refused to agree to any such guarantee, and also rejected the Union's proposal that all bargaining unit employees be given forty hours of work on standardized shifts. Thus, the Union's proposals that all bargaining unit employees be given benefits and a forty-hour work week became two of the key issues in negotiations between the parties.

38. In seeking to justify the Company's proposals, the Company representatives told the Union that Burlington planned to reduce its reliance on common carriers by using aircraft leased by its parent company and dedicated solely to carrying freight for Burlington and its parent company. That significant change in operations was designed to keep Burlington and its parent company competitive. It was originally scheduled to be implemented in the fall of 1985, but did not become operative until December 31, 1985. It resulted from a consultant's report that was prepared for the holding company which owns Burlington's parent company. It was anticipated that the use of dedicated planes rather than common carriers would reduce the number of freight arrivals at the Airport from in excess of twenty to only two per day. Management also suggested during

bargaining that, with the introduction of those planes, the Company could potentially require a lot more part-time employees, and fewer permanent regular employees, as the bulk of the freight would arrive at the same time and much of the work would be concentrated in a period of about five hours per day. However, it was anticipated that there would continue to be a nucleus of permanent regular employees. When the Union representatives asked how many part-time employees there would be, the Company representatives said that they did not know, but that there might be up to forty or fifty. The Company representatives further indicated that they needed to retain flexibility in scheduling employees since they would have to plug into a system that would involve all of the various locations which those dedicated planes would be flying to and from in the United States. Further uncertainty concerning scheduling was created by the fact that the parent company was having difficulty in obtaining landing rights in Canada for the larger planes which it intended to lease. Thus, it was anticipated that the planes would initially have to land in Buffalo. From there, smaller planes which had been granted landing rights in Toronto would be used to transport small packages to the Airport. Trucks (operated by another company under a contract with Burlington) would be used to transport larger packages from Buffalo to Toronto.

39. As noted above, the Union's initial proposal was that all bargaining unit employees should have a forty-hour week, consisting of five consecutive eight-hour days, with set starting and quitting times. However, the Union subsequently modified that position by proposing several possible alternatives, including a ratio of permanent regular employees and permanent irregular employees, expansion of the bargaining unit to include part-time employees, and a guarantee of the existing number of permanent regular employees and permanent irregular employees. However, each of those alternatives was rejected by the Company representatives on the ground that they did not know what their work force requirements would be once the new planes were in place.

40. The Union bargaining committee was also very disturbed about the union security clause proposed by the Company. It was the Union's position that, with the exception of probationary employees, all bargaining unit employees should be required, as a condition of employment, to become and remain members of the Union in good standing. The Union also proposed a mandatory dues check-off provision. Article 3.01 of the union security clause proposed by the Company provided only for dues deduction from the pay of every employee who signed an authorization card directing such deduction. However, Article 3.02 provided that "each employee upon employment will be required to sign an authorization card directing the Company to deduct Union dues in accordance with the foregoing". Mr. Machika conceded in cross-examination that he was aware at all material times that such an authorization was not legally required. However, he testified that he wished to have that provision in the agreement so that employees would "be aware up front that Union dues would be deducted" and "so that there'd be no question about it at a later date". Mr. Bibeau characterized that position as "fancy language to confuse the issue". Mr. Grey described it as "unnecessary", and suggested that it would be an aggravation to persons who, under the Company's proposal, were not members of the Union.

41. The broad management rights clause proposed by the Company was also a source of concern to the Union. It gave the Company an unfettered right to contract out bargaining unit work. Deliveries to and pickups from customers in the area served by the Toronto station had always been contracted out by the Company. The Union did not consider that to be bargaining unit work, and was not seeking to prohibit the Company from continuing to contract it out. However, the work of transporting freight to and from the Airport had traditionally been performed by warehouse employees (classified as drivers/warehousemen). The Union was concerned that the Company might contract out the work of those members of the bargaining unit, one of whom was Mr. Best.

42. The Union was also highly concerned about the Company's Article 9.02 proposal concerning "just cause". It provided as follows:

9.02 The discharge of an employee who has completed his probationary period, hereinafter referred to as a "seniority employee", shall be for just cause. "Just cause" for discharge shall be deemed to include, but shall not be limited to the following:

- (a) Failure to follow Company's established policies, practices or procedures.
- (b) Insubordination or conduct which is abusive to supervision or Management.
- (c) Dishonesty.
- (d) Falsifying or withholding information on personnel questionnaires, employment application, production or work performance reports, time cards, or any other records or reports.
- (e) Failure to perform assigned duties; refusing to work overtime; negligence in the performance of duties likely to cause or actually causing personal injury or property damage; fighting or attempting injury to another; stealing, destroying or willfully damaging the property of another employee or the Company or anyone else; the possession, use or being under the influence of drugs or alcoholic beverages during working hours; carrying or possessing firearms or weapons on Company property; excessive tardiness or absenteeism; unsatisfactorily explained absences; unauthorized absence for more than two (2) days without notice to the Manager; violation of this Agreement; or failure to comply with Company rules, including safety rules.

Any grievance with respect to the exercise of this right to discharge or discipline shall be limited to the question of whether or not one of the offences occurred and shall not include whether the type of discipline selected by the Company was appropriate.

Although the Union representatives were prepared to agree that serious matters such as theft and destruction of Company property might well warrant discharge, they were adamantly opposed to specifying discharge as the penalty for refusing to work overtime and for engaging in broadly defined "offences" such as failure to follow the Company's established policies, practices, or procedures; dishonesty; and failure to comply with Company rules. In describing the effect of that provision from his point of view, Mr. Grey told the Board that under the language proposed by Burlington, "pretty well in general the Company could fire anyone for any reason". He also testified that he had never seen anything like it before, and that he could not accept that provision because the requirement of "just cause" would be unenforceable if that provision were included in the agreement. Also completely unacceptable to the Union was the above quoted provision which precluded arbitral review of the penalty of discharge or other discipline selected by the Company. The Union representatives were of the view that this provision handicapped the grievance procedure by arbitrarily preventing an arbitrator or arbitration board from substituting a lesser penalty in appropriate circumstances.

43. Also of serious concern to the Union was the fact that Article 6.02 specified discharge as the arbitrarily unreviewable penalty for employee participation in "any strike, picketing, sit down, slow down, or any suspension of or stoppage of or interference with work or production which shall in any way affect the operations of the Company". Moreover, although the Company was not prepared to require Union membership as a condition of employment, it nevertheless proposed (in Article 6.01) that the Union undertake and agree that while the agreement was in operation, neither the Union nor any employee would take part in, call, or encourage any of those activities. The Union representatives were of the view that it was inappropriate for the Company to demand such an undertaking without making Union membership mandatory for employees in the

bargaining unit, so as to give the Union an element of control over all such employees through internal Union disciplinary procedures.

44. Mr. Machika told the Board that the Company wished to have very specific language such as that contained in Articles 6.02 and 9.02 “so there wouldn’t be any room for [Burlington’s first level] management not to understand the contract”. A similar rationale was given to the Union during negotiations. However, as contended by Union counsel in his submissions to the Board, the complexity of a number of the provisions proposed by the Company, such as its seven-page grievance procedure provision and its reference to “the principle of estoppel” in its extensive management rights clause, belies that assertion.

45. The Company proposed a stringent, detailed grievance and arbitration procedure which specified that its time limits and other procedural requirements were mandatory and not merely directory. The Company proposal also expressly made section 44(6) of the *Labour Relations Act* inapplicable, and thereby precluded an arbitrator or arbitration board from extending the time limits where the arbitrator or arbitration board was satisfied that there were reasonable grounds for the extension and that the opposite party would not be substantially prejudiced by the extension. The Union representatives were concerned that the lengthy provisions of the grievance and arbitration procedure were too complex to be readily understandable by members of the bargaining unit. They were also concerned that the grievance procedure proposed by the Company bypassed the employee’s immediate supervisor and involved no Union official other than a steward. Those and other matters pertaining to the grievance procedure by the Company were discussed between the parties at great length and were ultimately resolved through a “one on one” meeting between Mr. Bigeau and David Brisbin, who replaced Ms. Crosby as the Company’s spokesperson when she went on maternity leave.

46. As noted above, the Union proposed that seniority be the determining factor in lay-offs, recalls, promotions, transfers, and overtime assignments, provided that the employee with the greatest seniority had the ability to perform the work. The Company, on the other hand, proposed (in Article 10.04) that seniority shall only be determinative where the employees’ “skill, ability, qualifications, dependability and reliability” were equal. Although in an effort to obtain agreement the Union representatives were prepared to compromise by making seniority the deciding factor only where the employees’ “skill, ability and qualifications” were relatively equal, they were not prepared to agree to “dependability and reliability” being included in the seniority provision, as they felt that those terms were too nebulous and would permit favouritism. The Company representatives, on the other hand, expressed the view that “skill, ability, and qualifications” were not as important in a warehouse setting as they were in other contexts. They contended that dependability and reliability were important because (in the words of Mr. Machika) “basically the only difference between most of the people in a warehouse is dependability and reliability”.

47. The lay-off clause proposed by the Company was also unacceptable to the Union. It provided:

10.05 In the event that lay-off is necessary, the Company shall lay off temporary, then probationary employees, if any, prior to laying off seniority employees. Seniority employees will be laid off in accordance with the provisions of Article 10.04.

That provision made no mention of part-time employees, whom the Union felt should be the first persons laid off. Moreover, as noted by the Union at the bargaining table and in these proceedings, that provision introduced yet another type of employee, referred to as a “temporary employee”, and did not reflect what had in fact been occurring in the warehouse.

48. The Company's job posting proposal also gave rise to extensive discussions at the bargaining table. It provided as follows:

11.01 The Company agrees to advertise permanent job vacancies for five (5) working days. During the posting period and until the vacancy is filled, the Company may temporarily fill the job as it wishes. In order for any employee to be considered, the applicant must have the qualifications necessary to satisfactorily perform the job and the job must be in a higher wage group than the applicant's. In making the selection, the Company will consider the factors set out in Article 10.04 hereof. Where the factors set out therein are equal in the judgement of the Company, the senior applicant will be given preference. In the event there are no suitable applicants, the Company may fill the vacancy from any source. An employee will be limited to one (1) successful bid in a twelve (12) month period. All employees interested in the job vacancy must make application within the five (5) day period that the vacancy is posted. Such job postings shall apply in respect of the original vacancy and will not apply to subsequent vacancies created by the filling of the original vacancy.

The Union representatives felt that Article 11.01 contained far too many restrictions. The requirement that the job be in a higher wage group than the applicant's precluded lead hands such as Mr. Taylor from applying for a lateral transfer to an opening for a lead hand on another shift. It also meant that if a driver/warehouseman such as Mr. Best lost his licence, the only job for which he would be eligible to apply would be that of lead hand, as the driver/warehouseman's wage rate was higher than that of a warehouseman. Also of concern were the twelve-month limitation, the restriction of the provision to the original posting, and the unreviewable power which the Company was seeking with respect to determining whether or not the aforementioned five factors were equal.

49. Other Company proposals opposed by the Union included a provision by which overtime would be mandatory (in inverse order of seniority) in the event that the work could not be covered by means of voluntary overtime (offered in order of seniority to employees at work at the time the need for the overtime arose), and a provision by which overtime would only be paid for hours worked in excess of forty hours per week, rather than in excess of eight hours per day, as proposed by the Union.

50. The only provisions on which agreement was reached at the January 16 bargaining session were minor, non-contentious items: Article 3.03 (by which the Company agreed to supply updated seniority lists to the Union Committee and the Union office twice a year), Article 6.02 (which adopted the definitions of "strike" and "lock-out" contained in the *Labour Relations Act*), and Article 7 (by which the Company agreed to provide a bulletin board for the use of the Union, and the Union agreed that all notices would be subject to approval by the District Manager prior to posting).

51. Considerable time was also spent discussing health and safety matters at the January 16 bargaining session. Employees had a number of health and safety concerns respecting the Company's premises and equipment. The Company had moved its Toronto terminal into a new warehouse in the fall of 1984, and since that time there had been a problem of excessive dust in the warehouse causing nosebleeds and respiratory problems for some of the employees. Wheel chocks were also needed to prevent parked trucks from moving while they were being loaded and unloaded at the new warehouses' docks by employees on forklifts. There were also concerns about the roller systems in the new warehouse and in the Company's trucks, the location of electrical boxes on beams in the new warehouse, the lack of floor bolts on warehouse racks, and the presence of propane tanks in the new warehouse. Mr. Best had been particularly vocal in raising these matters with management during the fall and winter of 1984. In December he had designed a new roller system on his own initiative and presented the design to management for their consideration.

(Messrs. Evans and Machika discussed that proposed design but concluded that it was too cumbersome. In rejecting it, they also took into account the fact that a system specialist in the employ of the parent company had recently designed a roller system for the Company, after coming to Toronto from California to assess the Company's needs. That system was purchased by the Company at a cost in excess of \$30,000.) At the January 16 bargaining session, management acknowledged that there was a dust problem in the new warehouse, and advised the Union representatives that the company which had constructed the warehouse would be looking into the matter. At that meeting, the Union representatives raised once again some of the aforementioned changes in terms and conditions of employment which had been made by management following the Union's certification. The Company's response continued to be that those matters would have to be negotiated.

52. The parties next met on January 22. Having spent most of the previous bargaining session voicing their concerns about the Company's proposals and explaining what they wanted, the Union representatives were hopeful that the Company would make some movement and accept at least some of the Union's proposals. There was extensive dialogue between the parties at that meeting, with each party explaining its concerns, but very little progress was made. The only provisions agreed upon on January 22 were Article 1.02 (by which use of the masculine gender in the agreement would "also be considered feminine"), Article 2.01 (the recognition clause which was identical to the bargaining unit description contained in the aforementioned certificate), and certain parts of Article 10.02 (which specified various ways in which a seniority employee could "lose his seniority standing and employment"). All of the language agreed to at that meeting and at the previous meeting was contained in the Company's proposals. The Company did not agree to any of the Union's proposals (with the exception of its recognition clause, which was identical to that of the Company).

53. Mr. Drake had little direct involvement with bargaining unit employees until February of 1985, when he decided to begin spending more time at the Toronto station. (His office was located at Burlington's head office, a short drive from the Toronto station.) In explaining that decision of the Board, he said, "We were very much involved in the labour situation in Toronto. Complaints came back to me from employees that we weren't communicating.... There were also problems occurring in the warehouse regarding intentional mishandling of freight." Mr. Drake also stated that Mr. Machika had been managing the Toronto station since November of 1984, when the Company's Toronto District Manager was terminated. He described the Company's efforts to find a suitable replacement as being "a long, drawn-out affair". Ultimately, Greg Richard was hired away from a competitor in April of 1985 to become Burlington's District Manager.

54. Having decided to become more directly involved in the operation of the Toronto warehouse, Mr. Drake telephoned Mr. Grey to request his approval for Mr. Drake to meet with the Company's two lead hands to discuss problems concerning the mishandling of freight. Mr. Drake testified that he called Mr. Grey in order to assure him that he was not attempting to negotiate directly with any members of the bargaining unit, but was "merely trying to keep things cool in the work place". Mr. Grey expressed the view that the proposed meeting was a "great idea".

55. Mr. Cordeiros also began to spend more time at the Toronto terminal in February of 1985, at the request of Mr. Drake. Mr. Cordeiros, who reported directly to Mr. Machika, had previously managed the day-to-day operation of the warehouse, and effectively resumed that role in February of 1985.

56. The next bargaining session was held on February 6, 1985. Since Mr. Grey was again "called out of town", Brian Bennett, the Vice-President of Local 91, attended in his place. The

meeting got off to a poor start when Mr. Bigeau arrived thirty minutes late, having mistakenly thought that it was scheduled for 9:30 rather than 9:00 a.m. After lecturing Mr. Bigeau concerning his tardiness, Ms. Crosby advised the Union that the Company was prepared to substitute "Supervisor" for "Manager" in Article 8.03 of the grievance procedure, and to increase some of the time limits, such as the time limit for filing a discharge grievance (which was two working days in the Company's original proposal, and which the Company was prepared to increase to three working days). The Union had earlier proposed that substitution to avoid problems that might arise if supervisors felt that bargaining unit employees were "going over their heads" by raising matters with a higher level of management without first discussing them with their supervisors. Ms. Crosby pointed to those changes as representing some movement on the part of the Company and appeared to expect the Union to respond with a major move. However, the Union viewed them as relatively minor changes that were not only for the benefit of bargaining unit employees, but also for the benefit of their supervisors. In the ensuing discussion, the Union agreed to accept the Company's revised proposal concerning Article 8.03 (which provided that no employee had a grievance until he had discussed his complaint with his supervisor, and went on to provide that if the employee's supervisor did not settle the matter to his satisfaction, the employee could present a written grievance). The Company's proposal concerning Step 2 of the grievance procedure was also accepted by the Union at that meeting with the addition of "a Union official" as one of the persons who could be present at the Step 2 meeting, along with "the employee, the steward and the District Manager or his designate". That addition was requested by the Union and was described by Mr. Bigeau as a "common sense change" designed to enable the Union to be in a better position to assess the merits of a grievance and to thereby facilitate its decision concerning whether or not to refer it to arbitration. Other Company proposals accepted by the Union at that meeting were Article 1 ("intent and purpose") and Article 4.02 (by which stewards are deemed to be representatives of the Union and officers are deemed to be officials of the Union, and by which the parties agree that the Union representatives and officials occupy positions of leadership and responsibility to see that the agreement is faithfully carried out).

57. After further discussion, the Union bargaining committee caucussed to consider their position and concluded that they could not move, as no progress was being made on any of the key issues. When the Company representatives returned, Ms. Crosby asked if the Union had another position to give them. When the Union representatives replied that they did not, Ms. Crosby accused them of not having done their homework. Mr. Bigeau's response was, "There's nowhere to go. You've got us boxed in." At that meeting, Ms. Crosby also stated that Local 91 generally serviced "Cadillac" types of units in the printing trade, but that it was "now dealing with a Volkswagen type of operation". The two Burlington employees on the Union bargaining committee were quite offended by that remark, which did little to facilitate bargaining. With tempers flaring and nothing being accomplished, Mr. Bigeau suggested that the parties "break off", and the Company representatives agreed with that suggestion.

58. The parties met again a week later on February 13, 1985. Mr. Grey was in attendance at that meeting, along with Messrs. Bigeau, Taylor, and Best. Mr. Brisbin was introduced as the Company's new spokesperson at that meeting, with the departure of Ms. Crosby on maternity leave. Mr. Brisbin tabled a "status document" containing language to which the parties had agreed as of that date. Mr. Grey tabled a further copy of the Union's proposals, which had been revised to include page numbers and an index. At that meeting, Mr. Brisbin stated that the Company needed a tremendous amount of flexibility because it was in a highly competitive service business which required the Company to "move and move fast" to remain competitive. He asserted that it was not practical to fix hours of work and that management would not permit an arbitrator to tell them how to run their business. He stated that extensive language was needed concerning management's rights to preclude an arbitrator from "implying restrictions" and giving the Company "bad surpris-

es” concerning grey areas. He added that the Company “just did not like” the Union proposals because they were “too potentially restrictive”.

59. In the early afternoon, Mr. Brisbin advised the Union of certain changes which the Company was prepared to make in its proposals in response to the Union’s concerns. Those changes included a reduction in the probationary period (from 90 worked days to 75 worked days); the addition of a second Union steward (to cover the afternoon shift); the addition of a clause by which management’s consent to a steward leaving his duties to attend to Union business or to discuss a grievance would “not be unreasonably withheld”; and the deletion of “dependability” as a factor to be considered in respect of lay-offs, recalls, and job postings. However, Mr. Brisbin indicated that the Company was opposed to any change concerning the definition of permanent regular and permanent irregular employees, remained opposed to mandatory Union membership, and was unwilling to agree that part-time employees would be the first employees to be laid off. In this regard, he stated that part-time employees would likely become a big factor in the business as the parent company was in the process of obtaining aircraft for its exclusive use. He added that management did not yet know what the schedules for those aircraft would be, but thought that they might need a substantial number of part-time employees to handle peak periods during the day and the afternoon, or might need to schedule employees to work split shifts. No significant changes were proposed by the Company concerning management rights, hours of work, discipline, or any of the other key issues.

60. A number of health and safety issues were discussed at the February 13 meeting, including the roller system, chocks, and excessive dust in the warehouse. Certain actions by Mr. Best were also discussed at that meeting. Mr. Brisbin expressed his client’s displeasure with the fact that during the preceding evening Mr. Best had returned to the warehouse after his shift without authorization by management. In his testimony before the Board, Mr. Best stated that he went to the warehouse around 10:45 p.m. on February 12 because he was concerned about health and safety on the night shift, and wanted to see the roller system in operation. (The roller system was not used during the day shift.) Although he acknowledged that he had no official status as an employee health and safety representative, he testified that he “was involved in a health and safety campaign and was there to make it safe.” Mr. Best did not disrupt or in any way impede the work that was being performed on that shift; he merely observed employees while they used the roller system. After Mr. Best had been there for five or ten minutes, Mr. Kaye approached him and asked him to leave. Mr. Best responded by stating that he was there “on health and safety purposes”, and refused to leave. Mr. Kaye then left and returned with Ms. Maynard, who asked Mr. Best what he was doing there. Upon hearing his explanation, she looked at Mr. Kaye and said, “The boys are almost finished work, aren’t they?” Mr. Kaye did not respond, but rather merely looked at Ms. Maynard with what Mr. Best described as “an odd expression on his face” before walking away. Ms. Maynard also left without saying anything more. Mr. Best thought, not unreasonably, that Ms. Maynard had meant that it was alright for him to remain in the warehouse because the work was almost finished. However, Ms. Maynard went to the office and telephoned Mr. Machika at his home. When she told him that Mr. Best had not left the premises when asked to do so by Mr. Kaye and by herself, Mr. Machika requested that she have Mr. Best pick up a telephone so that he could speak with him. At Ms. Maynard’s direction, Mr. Kaye summoned Mr. Best to the telephone to speak with Mr. Machika, who directed him to leave the building. Mr. Best told Mr. Machika he was only there in the interest of the Company and the workers to help solve problems and to ensure that the night workers were not working in unsafe conditions. Mr. Machika told him that he could not stay in the warehouse and that if he had any problems he should take them up with his supervisor. Mr. Best then said, “Come on Bill, I’m not bothering anyone.” Mr. Machika’s response was, “If you don’t get out of the building, I’ll call the police and

have you evicted." At that point, which was approximately fifteen minutes after he entered the warehouse, Mr. Best hung up the phone and left the premises.

61. After that matter had been raised at the bargaining table, Mr. Brisbin and Mr. Grey stepped out of the room to discuss it. During that discussion, Mr. Grey acknowledged that the Union had "some new people", undertook to "try to control them", and requested the Company to refrain from taking any punitive action against Mr. Best. Messrs. Grey and Brisbin also attempted to narrow the outstanding issues during that "one on one" conversation, but did not succeed in doing so because the Company was only prepared to move on issues which the Union considered to be relatively minor in importance, and was not prepared to move on any of the key issues. Following that discussion, Mr. Grey told Mr. Best that he thought his discussion with Mr. Brisbin had been helpful and that "hopefully there wouldn't be any action taken against [Mr. Best]."

62. On the following day, John Halbert, a Ministry of Labour Health and Safety Inspector, attended at the warehouse at the request of Mr. Best. After inspecting the premises and meeting with management in the presence of Mr. Best, Mr. Halbert ordered the Company to cause a joint health and safety committee to be established and maintained at the work place, as required by O.H.S.A. He also ordered that unattended trucks at the shipping and receiving dock be immobilized and secured against accidental movement. He advised management to consult with the Industrial Accident Prevention Association concerning tow motor safety, to involve supervisors in a safety training seminar, and to provide training concerning "pull straps blue and red weight capacities", gross weights of truck vehicles, and loading. That meeting lasted from approximately 1:00 to 1:45 p.m. Mr. Best left the meeting feeling quite content, as some of his health and safety concerns had been found to be legitimate and were to be remedied.

63. Mr. Machika telephoned Mr. Grey at approximately 2:30 that afternoon and asked him if he had advised Mr. Best to contact a health and safety inspector. Mr. Grey replied in the affirmative and went on to say that he hoped that the Company would not take any punitive action against Mr. Best as the Union was trying to negotiate a collective agreement. Mr. Machika told Mr. Grey that he had decided to suspend Mr. Best for two days without pay. Mr. Grey was very troubled by that decision and told Mr. Machika, "I will not be responsible for the consequences."

64. After the aforementioned meeting with Mr. Halbert, Mr. Best was sent to the Airport. When he returned shortly after 3:30 p.m., his supervisor told him that Mr. Machika wanted to see him. When he went to the office, Mr. Machika gave him the following letter:

On the 7th of August 1984 a letter was put into your personnel file advising you that, on the night of August 6th, you were on company premise [sic] while off shift and were asked to leave. You were advised that this would not be tolerated in future.

On the evening of February 12, 1985, you once again entered the company premise [sic] in the evening without authorization, and after being asked to leave by the Warehouse Supervisor and Night Operations Manager, I was contacted due to the fact that you would not honour their request.

This is the second time that this has occurred and I have no choice at this time but to suspend you from active duty, without pay, for two (2) working days.

Mr. Best was quite shocked by that suspension. When he said, "Bill, what are you doing", Mr. Machika replied, "We have no safety problems in here."

65. Mr. Machika testified that he decided to suspend Mr. Best because he could not condone his actions of interjecting himself into different aspects of Burlington's operation at his own

whim, without any consultation with management. However, we are satisfied on the totality of the evidence that the two-day suspension was actually motivated, at least in part, by a desire to penalize Mr. Best for contacting a health and safety inspector, and for the role which he played in the unionization of the Company's work force and in the negotiations which followed the certification of the Union. As indicated above, we are also satisfied that all of the other disciplinary action taken by the Company against Mr. Best following the certification of the Union was tainted by anti-union animus.

66. Near the end of the February 14 bargaining session, the Union bargaining committee caucussed for about ten minutes before returning to advise the Company that they intended to apply for conciliation, as only a few minor matters had been agreed upon and no progress had been made on any of the key issues during the first five bargaining sessions. It was their hope that a conciliation officer would be able to bring the parties closer together and foster some progress on those issues. They also felt that they would have a better chance of getting an agreement if the negotiations were (in the words of Mr. Grey) "brought to a head quickly with a deadline". The Company representatives suggested that the parties continue to bargain while the Union's conciliation application was being processed. However, the Union representatives declined to do so as they were of the view, not unreasonably, that it would serve no useful purpose.

67. The parties next met on April 9, 1985. That meeting was a conciliation session scheduled by John Miller, the conciliation officer appointed in response to the Union's application for conciliation. The meeting began with an announcement by the Union that it planned to file complaints against the Company on behalf of Mr. Best and another employee in the bargaining unit. (The latter complaint was subsequently withdrawn by the Union.) After the parties had advised Mr. Miller of what had occurred during the course of negotiations up to that time, there was a further discussion of the items remaining in dispute. The Company representatives explained Burlington's position to Mr. Miller and the Union by going through the Company's proposals point by point. They also reviewed the Union's proposals and responded to the ones that had not already been responded to through the Company's proposals. In an effort to resolve some of the key issues, the Union representatives indicated that they would be prepared to look at a ratio of part-time employees to full-time employees, with the requirement that part-time employees be laid off first. However, the Company was unwilling to tie itself down to a fixed ratio, and was not prepared to agree that part-time employees would be the first to be laid off. It was the Company's position that who was to be laid off would be determined by the nature of the work remaining to be performed. Thus, it was only willing to agree that permanent regular employees could bump permanent irregular employees and that permanent irregular employees could bump part-time employees. Another alternative suggested by the Union was that part-time employees be included in the bargaining unit. That proposal was also rejected by the Company. The Union also sought an indication of the number of persons who would be permanent regular employees and the number who would be permanent irregular employees, but the Company was unwilling to commit itself, as it wanted to have the flexibility to schedule employees to work whatever hours it deemed appropriate. The Union representatives further suggested that the parties attempt to find some middle ground concerning the Union's proposal that employees not covered by the agreement be precluded from performing bargaining unit work. However, the Company was not interested in that suggestion. As indicated above, the Union had initially proposed a provision preventing the subcontracting of any work performed by members of the bargaining unit. At the April 9 meeting, the Union representatives expressed a willingness to modify that proposal to allow subcontracting if the subcontracting did not result in the lay-off of any members of the bargaining unit. However, the Company did not find that to be acceptable. Although there was considerable discussion concerning the key issues, no progress was made in resolving them. This lack of progress was a source

of great frustration to the members of the Union's bargaining committee. Messrs. Taylor and Best were so disturbed by the Company's intransigence that they got up and left the room.

68. Prior to the end of that meeting, the Company representatives complained that the employees were not working at their usual speed, were making too many mistakes, and were unhappy. The Union representatives indicated that they would look into those matters. They also advised the Company that they intended to request a "no board" report. In explaining the reason for making that request, Mr. Grey testified: "We were going nowhere. Sometimes agreements are reached under deadline bargaining. We felt that this had to be brought to a head one way or the other.... We'd been over these things time after time. [We requested a 'no board' report] to get a deadline so there could be the pressure of deadline bargaining so we'd get some movement and reach agreement."

69. Between April 9 and the next bargaining session which occurred on May 1, Messrs. Bigeau and Brisbin met to formulate a grievance procedure satisfactory to both parties. Mr. Brisbin was given full authority by the Company to modify the grievance procedure in such manner as he felt appropriate. Those discussions succeeded in resolving a number of matters pertaining to the grievance procedure provisions.

70. On Sunday April 14, the Union bargaining committee met with members of the bargaining unit to update them on the negotiations and to conduct a strike vote. Prior to the taking of that vote in which the employees gave the committee a unanimous strike mandate, Mr. Grey explained that before calling a strike, the Union would come back to the members of the bargaining unit with the Company's final offer. He also explained the matter of timeliness of a lawful strike, and advised them that a strike would not be called without the approval of the International Typographical Union (the "I.T.U."), as that approval had to be obtained before they could receive strike pay. He told them that prior to granting such approval, the I.T.U. would send in an International Representative in an attempt to resolve the dispute without a strike, and that the International Representative would report back to the I.T.U. concerning whether or not a strike should be sanctioned. At that meeting the Union representatives also raised the complaints that had been made by the Company at the bargaining table concerning the employees' attitude, working speed, and work-related mistakes. Mr. Bigeau's testimony in that regard was: "We told them that we would do the bargaining. We wouldn't put up with this. If the time came to be unhappy, we'd let them know. As far as I know everyone left with that understanding."

71. Claudio Cristini commenced employment with Burlington in June of 1980. He was employed in the bargaining unit as a co-ordinator at all material times (prior to the lock-out described below). Unlike warehousemen who handle the freight of a large variety of customers, co-ordinators are assigned to handle distribution for a few major customers. They are in frequent contact with those customers and deal almost exclusively with their freight. Mr. Cristini told the Board that he had been "quite close" to Mr. Drake prior to certification. His mother had made Italian sausages for Mr. Drake and he was on a first name basis with him. He also told the Board that they made "little bets" from time to time. On the morning of April 26, Mr. Cristini approached Mr. Drake and asked him why bargaining was taking so long. After advising Mr. Cristini that he could not discuss what was actually going on in negotiations, Mr. Drake stated that "if the Union said something, the Company replied and it went back and forth like that". Since Messrs. Taylor and Best had expressed the view that Mr. Machika was responsible for the lack of bargaining progress, Mr. Cristini asked Mr. Drake if Mr. Machika was "really stalling in bargaining". Mr. Drake replied, "Well, Bill Machika only does what he is told to do." This reply upset Mr. Cristini, as he interpreted it to mean that Mr. Drake was the one who was stalling the negotiations. After lunch, Mr. Drake came back to Mr. Cristini and said, "I don't think the Union is tell-

ing you everything. Do you know that in six months [the Union] can be decertified?" He also asked him if he knew that after the employees had been on strike for six months, the Company did not have to give them their jobs back. Mr. Cristini found those statements to be "threatening types of suggestions".

72. At approximately 9:45 on May 1, the four bargaining unit members in the Company's distribution department (Claudio Cristini, his brother Clem, Gordon Dalziel, and Bill Genge) were called to the boardroom in the front office where Mr. Drake informed them that Hewlett-Packard, one of the respondent's major customers, had pulled its account and that all of its freight was to be shipped out of the warehouse by the following Friday. He also told them that jobs would be lost, but that the persons affected by that loss would be able to bump other employees because of their seniority, with the result that less senior employees would be terminated. Mr. Drake then met with Hewlett-Packard's Distribution Manager for over an hour and succeeded in persuading him that Burlington's employees would continue to provide the same high level of service to Hewlett-Packard regardless of what was going on in negotiations. Later that day, the employees in the distribution department were advised that Mr. Drake had managed to persuade Hewlett-Packard to leave its business with Burlington as long as there was no deterioration in service.

73. The next bargaining session also occurred on May 1. The parties met at the Ministry of Labour's offices at 400 University Avenue with the assistance of Mr. Miller, who had been appointed as a mediator following the issuance of the "no board" report requested by the Union. At that meeting Mr. Brisbin announced that Burlington had hired employees to replace the members of the bargaining unit in the event of a strike or lock-out, and that those new employees were in the warehouse being trained to do the work. The Company representatives stated that the Company had to keep operating because of the competitive nature of the industry. They also indicated that if Burlington did not continue to operate, work would be lost, probably irretrievably. Although the members of the Union bargaining committee were shocked by that announcement, they agreed to continue bargaining.

74. Mr. Machika also stated at the May 1 meeting that Hewlett-Packard was negotiating with one of Burlington's competitors and would probably withdraw its business from Burlington, with a consequent loss of some bargaining unit positions in the distribution department, and a considerable amount of revenue. He added that Burlington officials, including Mr. Drake, were meeting with Hewlett-Packard that day in an attempt to keep the account, but that they were not optimistic as Hewlett-Packard seemed to be intent on withdrawing its business from Burlington on the ground that there would likely soon be a deterioration or disruption in service due to the fact that Burlington and the Union had been unable to negotiate a collective agreement. In response to a question from Mr. Bigeau, Mr. Machika confirmed that he had been contacting non-union trucking firms to determine if they would make deliveries during a strike.

75. At the May 1 bargaining session, the Company provided the Union with a typed document entitled "Position of the Company with respect to Certain Outstanding Issues as at May 1, 1985" (the "position paper"). Revised proposals concerning discharge cases, hours of work, and the grievance procedure were appended to the position paper. Although a number of those revisions were acceptable to the Union, they did not provide a basis for resolving the key issues that remained in dispute. The Company had initially proposed that an employee who successfully completed his probationary period would have his seniority date backdated to his original date of hire. However, the Union representatives had suggested that this provision might give rise to inequities in the context of persons who worked for several years as part-time employees before assuming bargaining unit positions. In response to that concern, the Company offered through its position paper to withdraw that provision. The Union agreed to the proposed withdrawal. The Company

also agreed to withdraw from its job posting proposal the requirement that “the job must be in a higher wage group than the applicant’s”. After discussing those matters, and engaging in some further “give and take”, the parties agreed to Article 10.01 (which provided that the probationary period would be ninety calendar days, that the lay-off or discharge of a probationary employee would be a matter beyond the scope of the collective agreement, and that upon successfully completing the probationary period, an employee would be credited with ninety calendar days’ seniority), and Article 10.06 (by which an employee who had been transferred by the Company to a position outside the bargaining unit would be credited with his full seniority for time spent within the bargaining unit if he later returned to the bargaining unit). Agreement was also reached on a provision under which Burlington would provide a private area for the Union representative to meet with a Union steward or an employee in some circumstances. The Company also offered to delete the last paragraph of Article 9.02 (as quoted above), and to specify a range of penalties for the misconduct described in parts “a”, “b”, and “e” of that provision. However, even with those proposed revisions, Article 9.02 remained unacceptable to the Union as it continued to specify discharge as the only penalty for “dishonesty”, and for the misconduct described in part “f”.

76. On May 1 the Company also proposed the following new language concerning lay-offs:

10.05 In the event of a reduction in the hours or layoff, permanent regular employees qualified to perform the remaining work may displace permanent irregular employees. Similarly, permanent irregular employees qualified to perform the remaining work, may displace a part time under 24 hour person.

The Union’s reaction to that provision was described as follows by Mr. Grey in his testimony in chief:

That implied that permanent irregular employees would be laid off first. They would bump permanent irregular employees who would in turn bump part-time employees who were outside the bargaining unit. That revealed to our committee what we had been saying and fearing all along. The Company had now put it in words. With the language in management’s rights, the language in hours of work, and the language in this clause, it was foreseeable that there’d be no union left and everything else wouldn’t mean a thing. That’s what this clause meant to us.

77. At the end of the mediation session on May 1, Mr. Miller asked the Union representatives to prepare, for presentation at the next session, a revised position on what it would take, from the Union’s perspective, to get a contract. In an attempt to comply with that request, the Union bargaining committee met at the Union office following that meeting and reviewed the outstanding issues. They concluded that they could offer some minor amendments in some areas, but that there was nowhere else for them to go on the key issues. Mr. Bigeau told the Board: “We could not move on the key issues.... If we typed up a document, it would have said, ‘as [per] union proposal’.”

78. Before deciding to introduce “replacement workers” into the warehouse on May 1, Mr. Drake contacted Mr. Grey and asked him for a commitment that the Union would give the Company at least four or five days’ notice before a strike occurred. Since that commitment was not forthcoming, management decided to bring the replacement workers into the warehouse prior to the time at which a legal strike could occur, for the purpose of training them to replace the Company’s traditional work force in the event of a strike. They were aware that bargaining unit employees could embark upon a lawful strike at midnight on May 3, and were of the view that three days was the bare minimum of training time required.

79. The introduction of those new workers into the warehouse created a high level of tension. As one would expect, bargaining unit employees were less than enthusiastic about training

persons, whom they characterized as "scabs", to take over their jobs during a strike. Some of those persons took it upon themselves to perform many of the functions usually performed by regular workers, leaving some of the regular workers with little to do. However, they made many mistakes due to their unfamiliarity with the Company's operations. Others, such as a burly fellow whose military garb landed him the nickname "G.I. Joe", performed little or no work and were viewed by at least some of the bargaining unit employees as having been brought in by the Company in an attempt to intimidate them. In addition to the replacement workers, salesmen and other persons excluded from the bargaining unit observed bargaining unit employees while they were working in order to gain familiarity with the work, and to keep a watchful eye on their performance. They also accompanied bargaining unit employees when they went to the Airport to pick up or deliver freight.

80. On May 2 members of management gave each of the bargaining unit employees a copy of the following letter concerning benefit coverage during a legal work stoppage:

Dear Employee:

As you know, after midnight on Friday May 3, 1985, the Company and the Union will be in a legal work stoppage situation.

If such occurs, your benefit coverage will cease during the period of the stoppage.

To help in minimizing the initial dislocation of such benefits cessation, the Company is prepared to make arrangements with the insurers for coverage to continue for the first month of the stoppage upon receipt of payment *in advance* from the Union of \$1,452.89 to cover the monthly group cost.

If the work stoppage continues beyond one month, each subsequent month will be dealt with on an individual basis.

Regards,

(signed) Bill Machika.

81. A further mediation session was held on May 3. Richard Weatherdon, an I.T.U. International Representative, attended that session along with Messrs. Grey, Bigeau, Taylor, and Best. Mr. Weatherdon was present in accordance with the aforementioned I.T.U. policy of sending an International Representative to the bargaining table to attempt to resolve the dispute and to report to the I.T.U. as to whether or not strike approval should be given.

82. When the mediator asked the Union representatives for their revised position on May 3, they told him that they did not have one, and asked him to obtain a final offer from the Company. After speaking with the Company representatives, Mr. Miller returned to the Union representatives and again asked them to give him their bottom line position. The Union representatives spent the rest of the morning and the start of the afternoon preparing a revised proposal for presentation to the Company. Through that revised proposal, the Union withdrew a number of its earlier demands, including provisions which preserved existing working conditions where they were superior to those contained in the agreement, precluded the Company from requiring employees to operate equipment in unsafe operating condition, required the Company to continue to provide clean and sanitary lunchroom and washroom facilities and to maintain safe and healthy plant conditions, prohibited the Company from using job transfer as a method of discipline, required the Company to provide the Union with a copy of its overtime records in the event of a dispute concerning overtime payments, and stipulated that only employees covered by the agreement would be trained to operate or maintain new equipment introduced to perform bargaining unit work. The

Union proposal accepted Burlington's management's rights clause with the addition of a "just cause" limitation on disciplinary action. That proposal also accepted some Company proposals on matters of secondary importance, and offered some revisions concerning job postings, the grievance procedure, and the Company's discharge provision. However, the Union's position remained unchanged concerning the key issues which included benefits for permanent irregular employees, union security, subcontracting, order of lay-offs, hours of work, and voluntary overtime. The Union's revised proposals were presented to the Company by the mediator at about 2:15 p.m. However, that proposal, which Mr. Machika described as "a nickel and dime proposal", was not acceptable to the Company.

83. At approximately 4:30 that afternoon, the Company presented a proposed collective agreement which was referred to by the parties as the Company's "final offer". In presenting that offer on behalf of the Company, Mr. Brisbin noted that there could potentially be a legal work stoppage as of midnight that night. He also indicated that a pre-condition to settlement would be the withdrawal of the complaints that had been filed with the Board. The Union bargaining committee caucussed for about half an hour to examine that final offer before meeting with Company representatives again. During the course of that meeting, Mr. Brisbin told the Union representatives that Burlington was prepared to apply for a government supervised vote on its offer, pursuant to section 40 of the Act. However, the Company did not do so because the Union representatives indicated that they would take the offer to the membership for a vote.

84. Mr. Bigeau testified that the contents of the Company's final offer confirmed the Union representatives' suspicions that the Company never had any intention of entering into a collective agreement with the Union. Mr. Grey viewed the final offer as a challenge to the Union and as a clear indication that Burlington was not prepared to bargain fairly and reach a collective agreement. The offer incorporated very little of the language proposed by the Union, and demonstrated no willingness on the part of the Company to compromise on any of the key issues of concern to the Union. The aforementioned distinctions between permanent regular employees and permanent irregular employees remained in place, as did the mandatory time limits, and the mandatory overtime provision. Although a range of penalties had been specified for some of the offences listed in Article 9.02, discharge remained the sole penalty specified for others. Moreover, that provision continued to preclude arbitral review of the appropriateness of the disciplinary penalty selected by the Company. (Mr. Machika testified during re-examination that the language precluding arbitral review was "something that just didn't get deleted in the rush to put it together on May 3". However, that explanation was never provided to the Union at any time prior to the hearing of this matter.) The Company's position also remained unchanged concerning union security, job posting, and the inclusion of "dependability and reliability" as factors in Article 10.04. Burlington remained unwilling to guarantee hours of work or fixed shifts, but it proposed the following addition to Article 12.01:

While the Company cannot guarantee the number of hours to be done per day or per week or otherwise, the Company does recognize the desirability of a permanent regular employee being employed for five (5) eight (8) hour days in a forty (40) hour work week. The Company shall endeavour to provide such work to permanent regular employees subject always to the availability of such work through quantity of business, scheduling of business, customer demands, inclement weather, utility and mechanical breakdowns, labour disputes and other similar conditions beyond the control of the Company.

Mr. Machika told the Board that the respondent decided to add that language as a result of "a lot of discussion with the Union at the bargaining table", and statements by employees in the bargaining unit that the Company was "shafting them". Thus, he testified that the purpose of that language was "to try to assure employees that [management] was not going to use the non-guarantee

and that [management] would do [their] best to give them as many hours as possible". However, the Union representatives found that language to be unacceptable as they were of the view that it was unenforceable. Moreover, they remained deeply disturbed by the Company's revised proposal concerning Article 10.05 (as quoted above).

85. Although Burlington did not receive the Union's monetary demands until July of 1985, the final offer presented to the Union by the Company on May 3 included a monetary offer. However, the salary scale (Attachment "A" to that offer) had only two classifications: warehouseman and distribution co-ordinator. Thus, the Company was proposing to eliminate the classifications of lead hand and driver/warehouseman, which were the classifications held by Mr. Taylor and Mr. Best, respectively. That attachment also specified that all salaries presently above the scale would be frozen. Thus, Mr. Taylor, whose wage rate as a lead hand was approximately a dollar more per hour than the highest rate in Attachment "A", would receive no wage increase under the Company's proposal. The only explanation offered by the Company for the elimination of the lead hand classification was that the Company's other lead hand, Roy Burns, who was not on the Union bargaining committee, had approached Mr. Machika and stated that he did not feel he could do his job effectively while being a member of the bargaining unit. Although Mr. Taylor had been with the Company longer than Mr. Burns, management did not ask Mr. Taylor (or any other member of the Union bargaining committee) for his views on the subject. Mr. Taylor was very upset about the proposal to eliminate his position, as was Mr. Best. As a driver/warehouseman, Mr. Best had traditionally received 25 cents per hour more than a warehouseman. The Company's proposal would have resulted in a wage increase of only about 3.6 percent for Mr. Best (from \$8.93 to \$9.25 per hour). Attachment "A" to the final offer also specified that "[a]ll future hired warehousemen must obtain a 'D' licence prior to completing their ninety-day probation period." In attempting to provide a rationale for that provision and for the proposed elimination of the driver/warehouseman classification, Mr. Machika told the Board that the Company had a surplus of warehousemen/drivers. He also stated that with the change to dedicated airplanes, there would not be the necessity for that classification. He added that management was of the view that all warehousemen should drive the trucks.

86. Messrs. Taylor and Best were also very agitated by the fact that the Company's final offer made no mention of work boots, uniforms, and shift premiums. Thus, they viewed the proposal as one which would deprive employees of some of the benefits which they had previously received. When that matter was raised with the Company's representatives during the "shouting match" which occurred after the Union had reviewed the offer, Messrs. Machika and Brisbin looked through the proposal, stated that the omission of those benefits had been an oversight, and indicated that the employees would receive them. During that heated exchange, Mr. Taylor told the Company representatives that there was "no way that [his] boys would buy this". He also accused the Company of having "sold them down the river". Mr. Weatherdon launched into a prolonged personal attack on Mr. Brisbin and his law firm, which came to an end only when Mr. Miller interjected in an attempt to calm things down.

87. During the morning of May 3, Mr. Drake came out of the office at the Toronto terminal, walked to the distribution area in the middle of the warehouse where Claudio Cristini and some other bargaining unit members were working, and told them in a frustrated tone of voice that the Union had come to the mediation session that morning unprepared. He stated that the Union had failed to prepare a revised set of proposals as the mediator had requested them to do for that meeting. He added, in a highly sarcastic tone, "They're doing a real good job for you." In his testimony before the Board, Mr. Drake acknowledged that he had used what he characterized as "very strong language" that day to tell the employees what he thought of their Union and its representatives, who had been telling them that the Company negotiators had been dragging their feet but

were (in his view) themselves wasting precious time by "showing up without having done their homework".

88. Mr. Drake returned to the distribution area that afternoon and told Mr. Cristini and other employees in that area that the Union bargaining committee had gone out for lunch without having made "any sort of attempt to negotiate". About an hour later he returned yet again to the distribution area where bargaining unit members Gordon Dalziel and Bill Genge were working. Claudio Cristini walked over to them in order to hear what Mr. Drake had to say, and Regional Operations Manager John Galley also joined them. In the ensuing discussion Mr. Cristini expressed the opinion that the Company was "out to shaft the employees". In support of that view he referred to management's refusal to guarantee full-time employees forty hours of work, their refusal to extend benefit coverage to all of the employees in the bargaining unit, and their reservation of the power to replace full-time employees by using part-time employees. During that heated conversation, Mr. Drake suggested that the Union had not been properly informing bargaining unit employees of what was happening at the bargaining table. He also stated: "Now you guys are going to know what it's like to play hard ball. No little printing union is going to push me around." As he walked away, Mr. Cristini asked Mr. Drake, "Why can't you just let us be?" Mr. Drake replied, "Deunionizing is the way everything is. Don't you read the papers?" At that point Mr. Galley stated: "Look at Dallas-Fort Worth and Minneapolis-St. Paul. They're decertifying." Mr. Drake then said, "Chicago has been on strike for a year and a half, and that there is probably going to be a decertification because the original employees have all left and are no longer active on the picket line." When Mr. Cristini said, "Then they must still be getting strike pay", Mr. Drake asked, "Do you think that your little printing union is going to keep you going for that long?"

89. Toward the end of the day shift on May 3, Claudio Cristini, Clem Cristini, and Gordon Dalziel were told that the Company's final offer would soon be available and that they would be paid overtime if they stayed to wait for it. They waited in their supervisor's office from five o'clock until about 6:30, when they and the night shift employees were given copies of that offer, along with the following memo from Mr. Drake:

Dear Fellow Employee:

As you are aware, the Company and your representatives have been meeting for several months in an attempt to negotiate an agreement.

While up until now we have not been able to agree upon a final document there has been substantial movement from each side's original proposal towards an agreement which provides security and competitive compensation for you the employee, but which also allows the Company to remain competitive on both a cost level, and a service level.

The Company at this point feels that our offer, a copy of which is attached, provides for good working conditions and fair compensation to our employees, while it provides to the Company the flexibility that it needs to manage the business, and maintain our position as Canada's leading airfreight forwarder.

Because we feel that this offer is fair to all parties involved, we will request that the Labour Board conduct a secret vote on this last offer.

I urge each of you to read this offer, as we feel it does address both the concerns of you the employee, and the Company. Together we have built the strongest air cargo organization in Canada, and we can work together in the future to maintain our # 1 position.

Contrary to the Union's allegations in these proceedings, we are satisfied on the totality of the evi-

dence that those materials were not given to any of the employees until after the Company had presented its final offer to the Union bargaining committee.

90. After giving the employees about ten minutes to read the offer, Mr. Cordeiros returned and asked them what they thought of it. Claudio Cristini replied, "It stinks", and Mr. Dalziel said, "It's terrible." They also went to see Mr. Drake in the front office to ask if the wage increases offered by the Company would be retroactive to the commencement of bargaining, but were told that they would be effective only from the date of the contract.

91. At approximately 10:00 p.m. on May 3, Messrs. Taylor and Best went into the warehouse because Mr. Best wanted to clean out his locker since he thought that a strike might begin that weekend. They also wanted to let the employees know that they would be available at a nearby hotel after work to discuss the events of the day. Since they were still very angry about the terms of the Company's final offer, they pounded their fists on a counter while they were in the warehouse and yelled, "Close them down! Lock them up!" Mr. Drake was on the premises at the time and heard the noise that they were making. As he was approaching them, Mr. Drake heard Mr. Taylor refer to the "replacement workers" in the warehouse as "scabs". Mr. Drake then ordered Mr. Taylor and Mr. Best to "get the hell out of the building" and added that it was Mr. Taylor who was "the scab". After complying with Mr. Drake's direction to leave the warehouse, Messrs. Taylor and Best drove around the parking lot several times in Mr. Taylor's car. When the coffee truck arrived, they stopped by the truck to talk to some of the employees during their break. Although in his evidence before the Board he denied doing so, we are satisfied on the totality of the evidence that while he was in the parking lot, Mr. Best spit on Mr. Drake's car and called out to Mr. Drake, "You should get your car washed."

92. On Saturday May 4, Mr. Drake telephoned Mr. Taylor at home and spoke with him for about 45 minutes. Mr. Drake commenced the conversation by saying that after all the years that they had worked together, he thought that they had a better relationship than was indicated by the yelling, pounding on the counter, and spitting on his car that had occurred on the previous evening. Mr. Taylor responded by saying that he had not spit on Mr. Drake's car and that he was sorry if anyone else had done so. With regard to the pounding on the counter and yelling, Mr. Taylor said that there had been a really tough meeting between the Company and the Union on Friday, and that he "flew off the handle" because he was very upset about the lack of progress in negotiations and about the contents of the Company's final offer. Mr. Drake replied that he knew how Mr. Taylor tended to get wrapped up in causes, but that he could not understand how Mr. Taylor had gone from being so pro-Company to being so pro-Union. The possibility of violence and damage to Company property was also discussed during that conversation. Mr. Drake asked Mr. Taylor not to get involved in any violence or damage as it could not come to any good. Mr. Taylor replied that there were some "hot-blooded young guys" in the bargaining unit and that he did not know if he could control them all of the time. When Mr. Taylor expressed the view that Burlington's final offer was ludicrous, Mr. Drake said that it was as good an offer as the employees were going to get in view of the competitive nature of the business. He characterized Local 91 as a "two-bit union" that was losing membership. He further stated that he was not going to let any union tell him how to run his company. He also talked about the parent company's Chicago branch. He asked Mr. Taylor if he knew that "Chicago was out [on strike] for over two years" before they "came into line".

93. Members of the bargaining unit met on Sunday evening May 5 at the Avion Hotel to vote on the Company's final offer. Earlier that day, the Company gave copies of the following let-

ter to bargaining unit employees who were at work that day, and arranged for copies of the letter to be dropped off at the hotel, outside the room in which the meeting was to be held:

Dear Fellow Employee:

Inadvertently, we failed to include our present and existing policies regarding work boots, clothing and shift premiums in the agreement which was distributed on Friday, May 3, 1985.

The following will be added to the agreement immediately:

-WORKBOOTS

One pair of steel toe work boots per year for which the company will pay 50% to a maximum of \$30.00.

-UNIFORMS

The present policy with respect [sic] to each permanent regular employee will receive 7 uniforms per week and permanent irregular employees will receive 4 uniforms per week [sic].

-SHIFT PREMIUMS

Afternoon, starting time after 12H00 will be an additional \$.25 per hour. Evening shift, starting time after 22H00 will be an additional \$.40 per hour. Saturday shift, will be an additional \$1.50 per hour worked on Saturday. Sunday shift will be an additional \$2.00 per hour worked on Sunday. Sunday, after 22H00, will be treated as an evening shift (\$.40 per hour).

Mr. Drake dictated that letter to Mr. Cordeiros over the telephone on the morning of May 5. It was signed by Mr. Cordeiros on Mr. Drake's behalf. The Union bargaining committee was not provided with a copy of that letter prior to its distribution to members of the bargaining unit. However, as indicated above, the Company representatives had advised the Union bargaining committee on May 3 that the omission of those items from the Company's final offer was inadvertent, and had further indicated that the employees would receive them. We view that letter as being merely confirmatory of that information. It was distributed to bargaining unit employees so that they would have the entire Company proposal before them in writing on May 5 when they voted for its acceptance or rejection. Under the circumstances, we agree with counsel for the respondent that there is no merit in the Union's contention that the distribution of that letter was an attempt by the Company to circumvent the Union as the employees' certified bargaining agent, or to discredit the Union in the eyes of the bargaining unit members.

94. At that meeting on May 5, the employees voted unanimously to reject the Company's final offer. The vote was conducted by secret ballot. Following the vote employees asked, "What happens now? When do we go on strike?" Mr. Grey advised them that Local 91 did not have I.T.U. approval to call a strike and that they would not be going on strike at that time. He added that it was important that the Union be able to demonstrate that it had control of the situation. Accordingly, he requested the employees to remain at work and continue to do their jobs. He urged them not to work to rule or engage in any other job action. He also indicated that he would contact management to advise them that the Company's offer had been rejected.

95. The warehouse employees reported for work at their normal starting times on Monday May 6. When Mr. Best arrived, Mr. Machika asked him what was happening. Mr. Best's reply was, "I can't say anything but we're here aren't we?" Mr. Machika then telephoned Mr. Grey at home at approximately seven o'clock that morning to ask him if the employees were going on strike. Mr. Grey replied "No, as a matter of fact Bill I was going to call you when I got to the office and let you know the result of the vote. The employees voted it down 25 to nothing." Mr.

Machika then asked Mr. Grey, "Where do we go from here?" Mr. Grey's response was that he wanted to return to the bargaining table to continue bargaining. However, Mr. Machika was non-committal with regard to that request.

96. On May 7 management gave a copy of the following memo (Exhibit 1 in these proceedings) to each bargaining unit employee:

To: All Warehouse Staff

From: Jim Drake

Date: May 07, 1985

Subject: Labour Situation

On May 3rd, the Company presented its final offer to every member of the Bargaining Unit as well as your Union Negotiating Committee and the Ontario Labour Relations Board.

It is our understanding that a vote was conducted on Sunday May 5th, at which time the membership decided to reject this reasonable offer.

On Monday, May 6th, we continued to operate as normal but management have noticed that it is becoming increasingly difficult, under the present tense situation, as there have been increasing inaccuracies with respect to our bunking and checking in of freight.

We would therefore request that each individual member, or collectively as a Unit, advise management in writing of your acceptance of the offer dated May 3rd, or in the best interest of our customers and service standards, we must lock out all employees who have not replied in the positive at 07:00, on May 8, 1985,

Regards

(signed) Jim Drake

The Company did not inform the Union that it was making that offer to individual employees, nor that it intended to lock out any employees who did not accept the offer.

97. Mr. Drake told the Board that the wording of the final paragraph of that letter came from Mr. Brisbin, because of how legally delicate it was as to what the Company could or could not say at that time. In explaining the Company's decision to lock out its employees unless they accepted the Company's final offer, Mr. Drake told the Board: "As of May 5 the Union was in a legal position to go on strike. We felt we had a loaded gun to our head. We had absolutely no choice but to lock the employees out so that we could continue on with the business. Plus, as of May 6, the problems with the mishandling of shipments materialized all over again.... We really had no alternative. The mishandling of shipments was starting to cause us real problems internally and with our clients. If it would have continued much longer we could have had much of our business in jeopardy." He also testified that the lock-out letter was distributed to employees to make them aware that the Company was very firm in its offer, and that management was "not going to put up with any more of the shenanigans and sabotage that was taking place." As an example of the sabotage to which he was referring, Mr. Drake mentioned a piece of freight on which a zero had been changed to an eight by an unknown person, who (in Mr. Drake's view) intentionally misbunked that piece of freight. Mr. Drake told the Board (in cross-examination by Union counsel) that management's intent was to get a majority of the employees to accept the Company's final

offer. However, he acknowledged that the memo does not say that there would not be a lock-out if a majority of the employees did accept that offer. Moreover, he agreed with Union counsel that if "someone as an individual had accepted the offer", that person would have been able to come back to work for the Company during the lock-out, and that anyone who refused to accept it would be "out of work and pay".

98. When Mr. Richard handed that memo to Claudio Cristini, he asked him if he fully understood the last paragraph, and stated that it was Mr. Cristini's choice to go in and sign the contract by himself or with other people. Robert Miller was also given a copy of that memo by Mr. Richard on May 7 when Mr. Miller arrived at the warehouse to begin work at 4:00 p.m. Approximately two hours later, Mr. Richard approached Mr. Miller in the warehouse and asked him if he had switched hours with his brother (Steven Miller). After Mr. Miller confirmed that he had done so, Mr. Richard asked him when that had occurred. When Mr. Miller indicated that the switch of hours had been in place for about a month, Mr. Richard stated that Mr. Miller had not yet completed his probationary period "by working regular hours". Mr. Richard also told him that he had the option of either accepting the Company's offer or being locked out, but added that if he did not accept the offer, his employment could be terminated in view of his probationary status. Although Mr. Miller elected not to accept the offer (and was locked out with the rest of his co-workers), he had not been discharged by Burlington as of January 7, 1986 when he testified before the Board in these proceedings, nor is there any evidence that he was subsequently discharged by the Company. Nevertheless, it is clear that the respondent, through Mr. Richard, contravened section 66 of the Act by suggesting that Mr. Miller might be dismissed if he declined to accept the Company's final offer.

99. After Mr. Richard had given him a copy of that memo, Dale Robertson was approached by Mr. Kaye, who led him to the washroom where he was offered an opportunity to work a double shift at the new rate if he was willing to accept the Company's offer. When Mr. Robertson told Mr. Kaye that he was not prepared to do that because he did not want to let his friends down by "stabbing them in the back", Mr. Kaye said, "They'll be needing a lead hand and you look good for the job." Mr. Robertson who, not unreasonably, was of the view that Mr. Kaye was attempting to bribe him, also rejected that offer. During the course of that conversation, Mr. Kaye also offered to secretly transport Mr. Robertson to work in his truck during the lock-out. He also requested Mr. Robertson to pass on that offer to certain other bargaining unit employees. Mr. Kaye made a similar offer directly to James Brown, Gordon Dalziel, and Brian MacDonald.

100. Mr. Kaye was not called as a witness in these proceedings. Thus, the evidence concerning his aforementioned statements to bargaining unit employees was uncontradicted. Messrs. Drake and Machika told the Board that Mr. Kaye was not authorized to make any offers of that type to employees. Mr. Drake testified that about a week before the lock-out, management specifically told Mr. Kaye to curtail any discussions about such matters as they had become concerned, from some of the things he had requested permission to say to employees, that he did not know what the guidelines were concerning what management could and could not say during negotiations. For example, he asked Mr. Drake if the Company could make various commitments to specific individuals concerning job protection, seniority, and guaranteed hours. Mr. Drake testified that he directed Mr. Kaye not to communicate with employees about such matters, and to clear with upper management anything that he wished to say. Thus, it was the respondent's position that Mr. Kaye made those offers "on a personal basis, not on a Company basis".

101. Mr. Drake had another lengthy conversation with Mr. Taylor on the evening of May 7. He opened the conversation by stating that he wanted to thank Mr. Taylor and the other employees for having continued to work that night just as hard as they had ever worked before, in spite of

the pressure that they were under. He also told Mr. Taylor that as the lead hand who had set the tone for the rest of the workers, he was to be congratulated. They discussed the Company's use of security guards and replacement workers, and the possibility of violence on the picket line. Both of them expressed the hope that there would not be any violence. When Mr. Drake asserted that bargaining unit employees had been intentionally misplacing freight in the warehouse, Mr. Taylor stated that the errors were occurring because the Company was using outside workers, with a minimum of training, to do the work. In discussing the Union, Mr. Drake expressed the opinion that "unions are leeches" which "don't create the work" and "don't do the work". He also said: "I am in charge. I run the show. No union is going to tell me how to run the Company. I know the Union better than you. I know that there are clauses in [the Company's final offer] that Doug Grey could never sign." He also stated that he would never agree to a union security clause which required every employee in the bargaining unit to become a member of the Union. Mr. Drake suggested that it was unfair that employees perceived Mr. Machika as the "bad man standing in the way of a fair contract", as it was he, not Mr. Machika, who had the final say on everything. When Mr. Taylor complained that employees had not had a raise in two years, Mr. Drake said, "As long as this keeps up they're not going to get one." Mr. Drake also indicated that Burlington had the full backing of its parent company, with annual sales approaching half a billion dollars, and suggested that the Union would not be willing to pay strike benefits for very long as it was in financial trouble. He referred again to the fact that Chicago employees had been on strike for the past two years, that all of the original employees had left, and that the union was probably going to be decertified. He added, in a sarcastic vein, that it "really made a lot of sense" for the Chicago employees "to be on strike for two years and end up without a contract and totally out of a job". When Mr. Taylor asked why it would take two years to decertify, Mr. Drake said, "That's the law in the U.S. In Canada it's six months". He further indicated that after the employees had been out for six months, the Company would not have to take them back. When Mr. Taylor told Mr. Drake that the employees were not going to sign the Company's final offer on an individual basis as they were very united and would remain away from work "however long it takes to get a contract", Mr. Drake said: "Do you think that after you've been out there for awhile ... that everybody will be so united?" During that conversation Mr. Taylor asked Mr. Drake why the Company was proposing to eliminate his classification as a lead hand and to freeze his salary. Mr. Drake replied that Mr. Burns had requested to be relieved of his responsibilities as a lead hand in view of the inclusion of that position in the bargaining unit. This prompted Mr. Taylor to observe that his view should also have been canvassed on the matter. Mr. Drake advised Mr. Taylor that he and Mr. Cordeiros had been considering the addition of a second supervisor on each shift. He further stated that the job would be posted in the warehouse, and expressed the view that Mr. Taylor had "the best qualifications for it and the most seniority". When Mr. Taylor asked Mr. Drake, "Why are you telling me all these things", Mr. Drake said, "I can tell you these things because it's just you and me, and I could always deny it."

102. When he was asked during examination in chief if there were any clauses in the Company's final offer that he felt that no "self-respecting mainstream trade union" could accept, Mr. Drake said, "No." However, we do not find that response to be candid or credible in the circumstances of this case. In this regard, we accept Mr. Taylor's evidence that Mr. Drake told him on the evening before the lock-out that he (Mr. Drake) knew that there were clauses in the Company's final offer that Mr. Grey could never sign. Moreover, we view that statement as being indicative of Mr. Drake's state of mind concerning that matter at the material time. Mr. Drake's lack of candour concerning that and other matters about which he testified casts considerable doubt on the veracity of much of his evidence concerning the Company's motivation for adopting and pressing to impasse its position on the key bargaining issues, and for locking out its employees.

103. As noted above, the Company did not advise Mr. Grey, Mr. Bigeau, or any other

Union official that it intended to lock out the employees in the bargaining unit unless its May 3 offer was accepted, nor did it provide them with a copy of Mr. Drake's memo of May 7 (Exhibit 1). When Mr. Grey was told by a member of the bargaining unit that management had distributed that memorandum to the employees, he was very concerned that the Company was "circumventing the bargaining agent and going directly to the employees", as he saw this as a threat to the Union's bargaining rights.

104. None of the employees accepted the Company's final offer. All of the Company's regular bargaining unit employees were locked out by the Company on May 8, 1985. The lock-out continued until the Board, in the aforementioned decision dated July 10, 1986, directed the settlement of a first collective agreement by arbitration. Throughout the fourteen-month period during which the employees were locked out, Burlington continued to operate its Toronto station by using members of management, other persons excluded from the bargaining unit, and the aforementioned replacement workers.

105. On May 15, 1985, Mr. Richard sent the following letter to Mr. Poutsoungas:

This letter is to advise that you have been terminated from Burlington Northern Air Freight (Canada) Ltd. effective May 10, 1985.

Since you are a temporary part-time emergency call-in personnel, working less than 24 hours per week and have failed to report for work since May 7, 1985, we are left with no other choice but to terminate you from our employment.

If you have any questions, please feel free to contact the undersigned.

As noted above, the Company had unlawfully reduced Mr. Poutsoungas's weekly hours of work to twenty-four "because of the Union". But for that unfair labour practice, it is highly probable that Mr. Poutsoungas would have been regularly employed for more than twenty-four hours per week at the time of the lock-out, and would not have been faced with the choice of either breaking ranks with his fellow employees by reporting for work during the lock-out, or risking termination. Under the circumstances, we are satisfied that his termination should be overturned and that we should direct the Company to reinstate him, with compensation for lost wages and benefits, in order to appropriately remedy one of the adverse consequences of the respondent's aforementioned unfair labour practice.

106. At the time of the lock-out, a number of bargaining unit employees were purchasing Canada Savings Bonds through payroll deductions. After being locked out, they were each given the choice of paying Burlington the balance owing on their bonds in a lump sum or having the bonds cancelled. Those options paralleled the two options which the Company had traditionally given to employees who experienced a cessation of pay. The Company's action reflected the fact that the purchase of those bonds was effected through a master loan, on which the Company remained obligated to make payments whether or not the employees who were purchasing the bonds through payroll deductions continued to earn pay from which the deductions could be made. Under the circumstances, we are satisfied that the Company's action concerning those bonds, did not, in and of itself, constitute a contravention of the Act. However, if, as contended by the Union, the lock-out was itself unlawful, losses incurred by bargaining unit employees in respect of those bonds as a result of the lock-out would be compensable. (Our consideration and resolution of that issue is contained in paragraphs 118 and 119 of this decision.)

107. During the course of the lock-out, some of the employees attempted to obtain vacation pay from the Company. Rick Best, for example, telephoned the Company on June 5, 1985 and requested his vacation pay. The payroll department transferred his call to Mr. Machika, who told

him that he would look into the matter and suggested that he call back on Friday. When Mr. Best did so, Mr. Drake took the call since Mr. Machika was not there. Mr. Drake told Mr. Best that he could not have his vacation pay as he had not booked his vacation prior to the lock-out. The Company's position in that regard was that only those employees who had booked their vacation with the Company prior to the lock-out, had terminated their employment with the Company after the commencement of the lock-out, or had returned to work during the lock-out, were entitled to receive vacation pay. That position was formulated after Mr. Best called to request his vacation pay, as the issue had never previously arisen at the Toronto station. Only seven of the employees in the bargaining unit had booked their vacation prior to the lock-out, as the Company had failed to follow its usual practice of posting in the warehouse for about a week in late April or early May a sheet on which employees could specify the weeks which they wished to take as their vacation. Under that practice, where the Company was unable to accommodate all of the employees' requests, vacation weeks were allotted on the basis of seniority.

108. The Company's failure to post that vacation sheet constituted a further contravention of section 79 of the Act. But for that contravention, it is probable that most, if not all, of the employees would have "booked their vacation with the Company" prior to the lock-out, and thereby have become entitled to receive vacation pay under the approach subsequently formulated by the Company. Thus, it is unnecessary to comment on the propriety of that approach in the present case, as employees who did not receive their vacation pay at the time at which they would have become entitled to it under that approach if the Company had posted the vacation sheet (and they had booked their vacation prior to the lock-out) must be compensated for any loss which they suffered under that approach as a result of the Company's contravention of section 79.

109. On July 22, 1985 the parties attended a meeting called by the mediator. At that mediation session the Union provided the Company (through the mediator) with a full written response to Burlington's final offer. Since the Union had not tabled its monetary proposals prior to that time, its July 22 response provided the Company with its first indication of what the Union was seeking in that area. That response also demonstrated the Union's intention to press for a "just cause" clause without any specific penalties, and to remain firm with respect to its position on the other key issues. The Union also proposed that the probationary period be revised to sixty days; prior to the lock-out, it had tentatively agreed to a ninety-day probationary period. A further change in position occurred with respect to the factors to be considered in case of increase or decrease in the work force, and in filling job vacancies. The Union had previously agreed to seniority being a determining factor only where skill, ability, and qualifications were relatively equal; on July 22 it proposed that seniority be accorded greater weight. No progress was made at that session as both parties remained firm concerning their respective positions on the items remaining in dispute.

110. A further mediation session that was held on November 13, 1985 also proved to be unsuccessful. After waiting from 10:00 a.m. until 11:30 a.m. while the mediator met with the Union bargaining committee, the Company representatives met with the mediator to explore possible avenues of settlement. Within a few moments, Messrs. Grey and Best returned to the room, asked to be excused, and said that they wanted their coats. About fifteen minutes later, Mr. Machika was paged and, upon answering the page, was advised that Messrs. Grey and Best were at the warehouse conducting a demonstration with bus loads of delegates from the Ontario Federation of Labour Convention. Mr. Machika felt that the Company had been betrayed and instructed Mr. Brisbin to advise the mediator that the Company would not continue to negotiate while two members of the Union bargaining meeting were "back [at the warehouse] causing a ruckus". The Company representatives then broke off the session and left.

111. In December of 1985 the Company, on a "without prejudice" basis, offered to agree to a mandatory membership union security provision if the Union was prepared to accept all other aspects of the Company's "final offer" and to withdraw its complaints to the Board. That proposal was not acceptable to the Union.

112. We have already dealt with a number of the Union's unfair labour practice allegations. However, several important matters remain to be decided, including whether or not the respondent has contravened section 15 of the Act, and whether or not the aforementioned lock-out contravened the Act.

113. Section 15 provides:

The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.

In *T. Eaton Company Limited*, [1985] OLRB Rep. March 491, the Board wrote as follows concerning two of the major functions of that provision:

33. The Board regards the section 15 duty to bargain in good faith as having at least two major functions. The first is to reinforce an employer's obligation to recognize the trade union as the lawfully selected bargaining agent of employees. To this end, the section requires an employer to negotiate with the bargaining team selected by the trade union. The employer cannot seek to determine the structure and composition of the union's bargaining team. See: *High Times Publication Ltd.*, [1984] OLRB Rep. Oct. 1448. The Board has also concluded that the section prohibits an employer from attempting to by-pass the union and bargain directly with employees. See: *A. N. Shaw Restoration Ltd.*, [1978] OLRB Rep. May 393.

34. The second major function of the section 15 duty is to oblige the parties to enter into serious negotiations with the shared intent of entering into a collective agreement. This requires that the parties explain their positions to the other side, so as to allow for rational, informed discussions. See: *Canadian Industries Ltd.*, [1976] OLRB Rep. May 199. It also requires that an employer be prepared to enter into a collective agreement. An employer cannot enter into negotiations with the intent of ridding itself of the trade union. Neither can it simply engage in "surface bargaining", whereby it "goes through the motions" of bargaining without any real intent of signing a collective agreement. See *Radio Shack*, [1979] OLRB Rep. Dec. 1220. Section 15 does not, however, require that an employer agree to the terms of a collective agreement proposed by a trade union. Neither does it prohibit an employer acting in its own self-interest from engaging in "hard bargaining" so as to obtain an agreement with terms favourable to it. We would refer in this regard to the following excerpt from *C.C.H. Canadian Limited*, [1974] OLRB Rep. June 375, where the Board commented:

There was no evidence to suggest that the company's position on these items was other than "hard bargaining". There is no requirement that a company must make concessions or agree to a particular agenda of discussions. The parties met often and bargained hard. Because the union might have to accept an agreement "tailored to the company's measurements", to use a modified version of Mr. Peacock's own chosen words, is no reason to conclude that the company was bargaining in bad faith. (See *Regina ex. rel. Hearn v. Norfolk General Hospital* [1957] 119 C.C.C. 290 (Ont. Mag. Ct.)). There was no evidence to suggest that the company was unprepared to sign an agreement; but of course it wanted an agreement on its own terms. Collective bargaining is redolent of self interest and without evidence to suggest the company's terms were so unreasonable as to suggest that, in reality, it wanted no agreement and no trade union, the Board is unprepared to grant the application.

....

For other decisions concerning the distinction between "hard bargaining" and "surface bargain-

ing", see *Aristokraft Vinyl Inc.*, [1985] OLRB Rep. June 799; *Radio Shack*, [1985] OLRB Rep. June 901; and the numerous authorities cited in those decisions.

114. Reference may also usefully be made to *Radio Shack*, [1985] OLRB Rep. Dec. 1789, in which the Board wrote, in part, as follows:

33. The fact that the company's proposals may not have been acceptable to the union, does not mean that the company was not prepared to enter into a collective agreement - albeit on its own terms; nor is it really very helpful to suggest that the proposals were "predictably unacceptable". That characterization is equally applicable to the union's proposals, and if that were the test for a breach of section 15 of the Act, then the legality of a party's bargaining stance would turn on the willingness of the other side to accept it. It may be that a union's failure to achieve its stated goals will diminish its stature in the eyes of its members and make it less attractive to prospective members. But this does not mean that employer resistance is illegal. The union may simply have overestimated its ability to wring concessions from an unwilling employer and misjudged the effectiveness of its strike weapon.

34. This is not to say that the Board is totally unconcerned with the *content* of the parties' proposals or that there are no limits whatsoever on the scope of bargaining. In some circumstances, the Board may well have to assess the content of the items tabled in order to determine whether an employer does not really intend to enter into any collective agreement or whether it is really refusing to recognize the union as the exclusive bargaining agent (see *Radio Shack*, [1979] OLRB Rep. Dec. 1220; *Fotomat Canada Limited*, [1980] OLRB Rep. Oct. 1397; *Irwin Toy Limited*, [1983] OLRB Rep. July 1064, and, particularly, *Wilson Automotive (Belleville) Ltd.*, [1980] OLRB Rep. July 1136). Bargaining proposals may provide evidence of such unlawful motive, and the Board may also review the content of those proposals to assess whether any of the proposed items is "illegal" (see *infra*). However, in general, the Board's role under section 15 of the Act is one of monitoring the *process* of bargaining, and not the *content* of the proposals advanced.

115. It is often quite difficult to determine whether an employer has been contravening section 15 of the Act by means of "surface bargaining", or has merely been engaging in "hard bargaining" which is not proscribed by section 15. The contents of a number of the proposals tabled by Burlington during the course of the negotiations described above are consistent with its counsel's able submissions that it was engaging in "hard bargaining" but not in bad faith bargaining. However, when all of the provisions tabled by the respondent are viewed, as they must be, against the background of the pervasive pattern of unfair labour practices in which the respondent engaged prior to and during the course of bargaining with the Union, and in light of the statements which Mr. Drake made to Mr. Taylor and to some of the other bargaining unit employees, it becomes fairly clear that, as contended by counsel for the Union, the respondent was not bargaining in good faith and making every reasonable effort to make a collective agreement. Although the witnesses called by the respondent offered a plausible business justification for a number of Burlington's proposals, and for its intransigence concerning some of the key items in dispute, no such reasons were tendered in respect of others, such as Article 3.02 (which made the signing of an authorization card directing deduction of union dues part of the union security clause), Article 6.02 (which specified discharge as the penalty for participation in "any strike, picketing, sitdown, slowdown, or any suspension or stoppage of or interference with work or production which shall in any way affect the operations of the Company", and precluded arbitral review of that penalty); and Article 9.02 (which specified penalties for several offences, including discharge as the sole penalty for "dishonesty", and precluded arbitral review of the type of discipline selected by the Company). Moreover, we do not find to be credible the reasons proffered for the elimination of the classifications of the two employee members of the Union bargaining committee. Having regard to the totality of the evidence, we find that this highly unusual proposal, which was first introduced as part of the Company's final offer, was intended to penalize Mr. Best and Mr. Taylor for their Union activities, and to send a clear message to other employees in the bargaining unit that participation in collective

bargaining through membership on the Union's bargaining committee would give rise to adverse consequences for the participants.

116. Further support for our conclusion that the Company contravened section 15 is provided by some of the contents of Mr. Drake's aforementioned communications with Mr. Taylor and some of the other bargaining unit employees. As indicated above, when he telephoned Mr. Taylor on the date of certification, Mr. Drake told Mr. Taylor that the certification of the Union was unfortunate and that it "put things in a whole new ball game" in which "all things are off". He also indicated that "negotiations take an awful long time". That Mr. Drake's game plan was to stall negotiations and create a situation in which employee dissatisfaction with the lack of tangible benefits from unionization would lead to decertification of the Union may reasonably be inferred from his comments to Claudio Cristini and the other distribution employees on May 3, and to Mr. Taylor on May 4 and May 7. That Mr. Drake, as the guiding mind of the Company, was seeking to avoid a collective agreement is particularly evident from his May 7 conversation with Mr. Taylor, in which he stated: "I am in charge. I run the show. No union is going to tell me how to run the Company. I know the Union better than you. I know that there are clauses [in the Company's final offer] that Doug Grey could never sign." Having regard to the totality of the evidence, we find that such clauses were included in the Company's offer for the purpose of avoiding a collective agreement.

117. In finding that the respondent has contravened section 15 in the manner described above, we wish to note, in fairness to Mr. Brisbin, that there is no evidence that he (or anyone else from his law firm) was attempting to assist the respondent in evading its responsibilities under the Act. When Mr. Brisbin was given full authority by the Company to modify the grievance procedure in such manner as he felt appropriate, his "one on one" discussions with Mr. Bibeau succeeded in resolving a number of matters pertaining to the grievance procedure provisions. However, it is evident that neither he nor Mr. Machika was given similar authority in respect of other items, as that authority resided with Mr. Drake, who, as the guiding mind of the Company, orchestrated many of the unfair labour practices described in this decision. Moreover, in the absence of detailed knowledge concerning what management was doing in the warehouse in respect of disciplinary action, and what Mr. Drake was saying to employees such as Mr. Taylor in private conversations, it is understandable that Mr. Brisbin would have felt that he was merely assisting the Company in hard bargaining.

118. The Union contends that the Company further contravened the Act by locking out the bargaining unit employees on May 8. The Act defines "lock-out" as follows:

1.-(1) In this Act,

• • •

- (k) "lock-out" includes the closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his employees, with a view to compel or induce his employees, or to aid another employer to compel or induce his employees, to refrain from exercising any rights or privileges under this Act or to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, an employers' organization, the trade union, or the employees;

• • • •

If an employer locks out employees prior to the time limits specified in section 72(2) of the Act, such lock-out will constitute an unfair labour practice. However, a timely lock-out can also be

unlawful in some circumstances. The pertinent jurisprudence in this regard is aptly summarized in the following passage from *Aristokraft Vinyl Inc.*, [1985] OLRB Rep. June 799:

28. We are satisfied that if a lock-out is imposed by an employer "with a view to compel or induce his employees to refrain from exercising any rights ... under this Act", it is illegal even if it is otherwise timely. (See *Irving Oil Ltd.*, 80 CLLC ¶14,054 (N.B.C.A.).) The Board stated in *Westroc Industries Limited*, [1981] OLRB Rep. March 381 at 392:

"... a lock-out aimed at dissuading employees from exercising rights under the Act is never lawful and the concept of timeliness simply has no application to such activity."

[emphasis added]

That aim need not be the sole, principal, or predominant one of the lock-out. It is sufficient to establish that a lock-out is unlawful, regardless of timeliness, if unlawful intent forms even a part of the motivation for the lock-out. (See *Westinghouse Canada Ltd.* [1980] OLRB Rep. April 577 at 600-605, and in particular paragraphs 54-56.) It is clear, therefore, that a determination of whether the lock-out was lawful in this case must rest on our assessment of the company's motive for imposing the lock-out. That assessment, as we said earlier, cannot be carried out in isolation. Regard must be had to all of the conduct of both parties, both before and during the lock-out to ascertain whether the company had an illegal purpose in doing what it did.

The principles set forth in that passage, and in the decisions to which it refers, are grounded upon sections 64, 66, and 70 of the Act. Section 64 makes it an unfair labour practice for an employer to interfere with the representation of employees by a trade union. Section 66(a) precludes an employer from discriminating against a person in regard to employment, or any term or condition of employment, because the person was or is a member of a trade union, or was or is exercising any other rights under the Act. Section 66(c) prohibits an employer from seeking, by the imposition of a pecuniary or other penalty or by any other means, to compel an employee to continue to be or to cease to be a member or representative of a trade union, or to cease to exercise any other rights under the Act. Section 70 proscribes the use of intimidation or coercion in that regard.

119. The application of those principles and provisions to the facts of the instant case results in a finding that the May lock-out was unlawful, as contended by the Union. Having regard to all of the evidence and the submissions of the parties, we are satisfied that at least part of the respondent's motivation for the lock-out was a desire to punish employees for having exercised their rights to join a union and engage in collective bargaining, and to dissuade them from continuing to exercise those rights. In view of that finding, it is unnecessary to determine whether the Company, through Mr. Drake, further contravened the Act by causing to be distributed to bargaining unit employees the memo of May 7, 1985 (Exhibit 1) which invited employees, individually or collectively as a unit, to advise management in writing of their acceptance of the Company's final offer. We also find it unnecessary to determine whether Mr. Kayes' statements to Messrs. Robertson, Brown, Dalziel, and MacDonald on May 7 constituted unfair labour practices, as they would not give rise to any additional remedial relief against the respondent in the circumstances of this case. The same is true of the offers of promotion which the Union contends were unlawfully made by members of management to various members of the bargaining unit.

120. Before turning to remedial considerations, we propose to briefly set forth the reasons why, in the aforementioned decision dated July 10, 1986 in File No. 0819-86-FC, we directed the settlement by arbitration of a first collective agreement between the Union and the Company under section 40a. That section provides, in part, as follows:

40a.-(1) Where the parties are unable to effect a first collective agreement and the Minister has released a notice that it is not considered advisable to appoint a conciliation board or the Minis-

ter has released the report of a conciliation board, either party may apply to the Board to direct the settlement of a first collective agreement by arbitration.

(2) The Board shall consider and make its decision on an application under subsection (1) within thirty days of receiving the application and it shall direct the settlement of a first collective agreement by arbitration where, irrespective of whether section 15 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of,

- (a) the refusal of the employer to recognize the bargaining authority of the trade union;
- (b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;
- (c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or
- (d) any other reason the Board considers relevant.

(3) Where a direction is given under subsection (2), the first collective agreement between the parties shall be settled by a board of arbitration unless within seven days of the giving of the direction the parties notify the Board that they have agreed that the Board arbitrate the settlement.

....

121. That provision gives statutory recognition to some of the potential difficulties which may be encountered in achieving a first collective agreement. Although it is remedial legislation which should be liberally construed and interpreted, section 40a does not supplant the primacy of the free collective bargaining process, nor provide for automatic access to arbitration in all cases where the parties are unable to negotiate a first contract. However, it does oblige the Board to direct the settlement of a first collective agreement by arbitration where the process of collective bargaining has been unsuccessful because of one or more of the conditions or circumstances listed in parts (a) to (d). In the instant case, the respondent did not have reasonable justification for the uncompromising nature of the bargaining position which it adopted with respect to certain aspects of Articles 3.02, 6.02, and 9.02, as described above, nor with respect to the elimination of the classifications of the two employee members of the Union bargaining committee. (In the circumstances of this case, it is unnecessary to determine whether the respondent had reasonable justification for the uncompromising nature of the bargaining position which it adopted in respect of other bargaining issues.) Moreover, by engaging in "surface bargaining", the Company failed to make reasonable or expeditious efforts to conclude a collective agreement. Thus, we are satisfied that the conditions or circumstances specified in section 40a(2)(b) and (c) were present in this case and that they, together with the pervasive pattern of unfair labour practices described above, caused the process of collective bargaining to be unsuccessful. That pervasive pattern of unfair labour practices, which included contraventions of sections 15, 64, 66, 70, and 79, is another "reason the Board considers relevant". Thus, the circumstances of the instant case also fall within the ambit of section 40a(2)(d). Accordingly, since it appeared (and still appears) to the Board that the process of collective bargaining was unsuccessful because of conditions or circumstances listed in paragraphs (b), (c), and (d) of section 40a(2), the Board was required under that provision to direct the settlement of a first collective agreement by arbitration.

122. It remains for us to determine the appropriate remedial relief to be awarded in respect of File Nos. 0037-85-U, 0039-85-OH, and 0446-85-U. A cease and desist direction in respect of the unlawful lock-out is not required since, by virtue of section 40(a)(13), issuance of the aforementioned direction under section 40(a)(2) obligated the respondent to "forthwith terminate the

lock-out and ... forthwith reinstate the employees in the bargaining unit in the employment they had at the time the ... lock-out commenced". However, the employees are entitled to be compensated for wage and benefit losses (including losses incurred in respect of Canada Savings Bonds) sustained by them as a result of the unlawful lock-out. The Union is also entitled to compensation for reasonable expenses which it incurred as a result of the unlawful lock-out, such as payments (analogous to strike pay) made to bargaining unit employees during the course of the lock-out.

123. Some of the relief requested by the Union in its complaint under section 89 of the Act is no longer necessary or appropriate in view of the fact that the statutory "freeze" period has ended, and in view of the fact that the parties are now bound by a collective agreement which prescribes wages, benefits, and other terms and conditions of employment for members of the bargaining unit. However, employees are entitled to compensation for the losses which they suffered during the statutory "freeze" period as a consequence of the respondent's contraventions of section 79. Moreover, the aforementioned discipline that was imposed in contravention of the Act must be rescinded, and those employees who were unlawfully suspended must be compensated for their wage and benefit losses. The same is true of the employees who were unlawfully demoted, or who had their hours of work unlawfully reduced. Moreover, as noted above, Mr. Poutsoungas is to be reinstated, with compensation for lost wages and benefits.

124. With respect to the respondent's breach of section 15, as recently noted by the Board in *Forintek Canada Corp.*, [1986] OLRB Rep. April 453, at paragraph 58, "[t]he justification for an award of damages for breach of the duty imposed by section 15 of the Act and the basis on which such damages might be assessed were both explored at length in *Radio Shack*, [1979] OLRB Rep. Dec. 1220, at paragraphs 96 to 115, *Canada Cement Lafarge Ltd.*, [1981] OLRB Rep. Dec. 1722, and *Fotomat Canada Limited*, [1982] OLRB Rep. July 1020." Although not every contravention of section 15 will result in an award of damages (see *Canada Cement Lafarge*, *supra*, at paragraph 26), we are satisfied that such an award is appropriate in the instant case. We will also follow the normal course of directing the respondent to post a notice in conspicuous places in the work place to advise employees of the results of these proceedings, and of their rights under the Act, and to remedy, at least to some degree, the adverse psychological impact of the respondent's contraventions of the Act: see *Holiday Juice Ltd.*, [1984] OLRB Rep. Oct. 1449, and *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254.

125. For the foregoing reasons, the Board, in the exercise of its remedial discretion under sections 89 and 93 of the *Labour Relations Act*, and section 24 of the *Occupational Health and Safety Act*, hereby declares that the respondent has contravened sections 15, 64, 66, 70, and 79 of the *Labour Relations Act*, and section 24(1) of the *Occupational Health and Safety Act*, and hereby directs that the respondent:

- (1) cease and desist from contravening sections 64, 66, and 70 of the *Labour Relations Act*, and section 24(1) of the *Occupational Health and Safety Act*;
- (2) pay to the Union, and to bargaining unit employees, compensation for their respective losses resulting from the respondent's unlawful acts and omissions, including, but not limited to:
 - (i) wages, benefits, and other losses resulting from the respondent's contraventions of section 79 of the Act;
 - (ii) bonuses and other losses resulting from the respondent's contraventions of section 66 of the Act;

- (iii) losses incurred as a result of the respondent's contravention of section 15 of the Act; and
 - (iv) losses (including losses incurred by employees in respect of Canada Savings Bonds which were being purchased by payroll deduction) sustained as a result of the unlawful lock-out;
- (3) revoke and remove from its files and records the aforementioned unlawful written warnings to Rick Best, Mark Wells, Brian MacDonald, James Brown, and Dale Robertson;
 - (4) revoke and remove from its files and records the aforementioned unlawful suspensions of Rick Best, D. J. Simec, and Dale Robertson, and compensate them for wages and benefits lost as a result of those unlawful suspensions;
 - (5) compensate Robert Miller and Dan Poutsoungas for wages and benefits lost as a result of the respondent's unlawful reduction of their working hours;
 - (6) compensate Dale Robertson for wages and benefits lost as a result of his unlawful demotion;
 - (7) reinstate Dan Poutsoungas and compensate him for lost wages and benefits;
 - (8) pay interest on the compensation ordered by the Board, such interest to be calculated (in respect of wages and other losses which accrued over a period of time) in accordance with Practice Note 13, dated September 8, 1980; and
 - (9) post copies of the attached notice marked "Appendix", after being duly signed by an authorized representative of the respondent, in conspicuous places at its Toronto station, where they are likely to come to the attention of bargaining unit employees, and keep them posted for sixty consecutive working days. Reasonable steps shall be taken by management to ensure that the notices are not altered, defaced, or covered by any other material. Reasonable physical access to the premises shall be given by the respondent to a representative of the Union so that it can satisfy itself that this posting requirement is being complied with.

DECISION OF BOARD MEMBER I. M. STAMP;

I agree with the decision of the majority in all respects except for their conclusion that the lock-out was unlawful. Under section 1(1)(k) of the Act, "'lock-out' includes ... a suspension of work ... by an employer ... with a view to compel or induce his employees ... to refrain from exercising any rights or privileges under the Act...." Having regard to that definition and to the fact that the lock-out was timely under section 72(2), I find that the lock-out was not unlawful. Accordingly, I would not award compensation for any losses sustained as a result of the lock-out.

Appendix

The Labour Relations Act

NOTICE TO EMPLOYEE

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH WE, RICK BEST, AND THE TORONTO TYPOGRAPHICAL UNION, LOCAL 91 (REFERRED TO IN THIS APPENDIX AS THE "UNION") PARTICIPATED. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE OCCUPATIONAL HEALTH AND SAFETY ACT BY SUSPENDING RICK BEST, AND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY VARIOUS ACTS AND OMISSIONS, INCLUDING FAILING TO FOLLOW ESTABLISHED PRACTICES REGARDING SHIFT BIDS, ANNUAL PAY INCREASES, NINETY-DAY REVIEWS FOR PROBATIONARY EMPLOYEES, UNIFORMS, AND DISCIPLINE; USING WRITTEN WARNINGS AND SUSPENSIONS TO PUNISH EMPLOYEES FOR HAVING UNIONIZED; REDUCING THE WORKING HOURS OF ROBERT MILLER AND DAN POUTSOUNGAS, AND SUBSEQUENTLY DISCHARGING MR. POUTSOUNGAS; DEMOTING DALE ROBERTSON; FAILING TO BARGAIN IN GOOD FAITH AND MAKE EVERY REASONABLE EFFORT TO MAKE A COLLECTIVE AGREEMENT; AND UNLAWFULLY LOCKING OUT BARGAINING UNIT EMPLOYEES.

THE LABOUR RELATIONS ACT GIVES ALL EMPLOYEES THESE RIGHTS:

- TO ORGANIZE THEMSELVES;
- TO FORM, JOIN, AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION;
- TO ACT TOGETHER FOR COLLECTIVE BARGAINING;
- TO REFUSE TO DO ANY AND ALL OF THESE THINGS (SUBJECT TO APPLICABLE PROVISIONS OF A COLLECTIVE AGREEMENT).

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS;

WE WILL CEASE AND DESIST FROM CONTRAVENING THE LABOUR RELATIONS ACT AND THE OCCUPATIONAL HEALTH AND SAFETY ACT;

WE WILL PAY COMPENSATION FOR LOSSES RESULTING FROM THE ACTS AND OMISSIONS WHICH THE BOARD FOUND TO BE UNLAWFUL;

WE WILL COMPLY IN ALL OTHER RESPECTS WITH THE BOARD'S ORDER.

BURLINGTON NORTHERN AIR FREIGHT
(CANADA) LTD.

PER:

(AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or destroyed.

This notice must remain posted for 60 consecutive working days.

0024-86-U Leslie A. Manders, Complainant, v. **Carlton Cards Ltd.**, Canadian Paperworkers Union, Dieter Plautz, R. Smart, and G. Bucella, Respondents

Charter of Rights and Freedoms - Collective Agreement - Unfair Labour Practice - Discharge of employee for failure to comply with collective agreement union shop clause - Employer and union not violating Act by enforcing union membership clause in collective agreement - Union security clause not violating Charter

BEFORE: *Owen V. Gray*, Vice-Chairman, and Board Members *J. A. Ronson* and *J. Redshaw*.

APPEARANCES: *T. D. Crawford* for the complainant; *D. L. Rogers* and *Dieter Plautz* for the respondent Carlton Cards Ltd.; *J. J. Nyman*, *M. Pupeza* and *S. Novick* for the respondent Canadian Paperworkers Union.

DECISION OF OWEN V. GRAY, VICE-CHAIRMAN, AND BOARD MEMBER J. REDSHAW;
December 3, 1986

1. Leslie Manders was dismissed from employment by Carlton Cards Ltd. ("Carlton") on April 1, 1986, for failure to comply with a collective agreement "union shop" clause which requires that employees in the bargaining unit covered by that agreement must become and remain members of the Canadian Paperworkers' Union ("the CPU"). She has filed this complaint under section 89 of the *Labour Relations Act* ("the Act") on her own behalf and on behalf of six other employees and former employees of Carlton: Marsha Young and Saidie MacKay, who were dismissed for the same reason, and Teresa Stone, Robert Gurlitz, Beverly Doyle and Bert Rocha, who became members of the CPU "under protest" after being told they would be dismissed if they did not. The complaint as filed alleges that the actions of the respondents in enforcing the union shop clause violated sections 68, 70, 71 and 46(2)(f) of the Act. The seven persons on whose behalf this complaint was filed are hereafter referred to collectively as "the grievors."

2. For many years, plant production employees of Carlton were represented in collective bargaining by the Independent Greeting Cards Workers' Union of Canada ("the Independent Union"). In 1985, a number of those employees joined the Canadian Paperworkers Union ("the CPU") and it applied to this Board for certification as exclusive bargaining agent for the unit of employees then represented by the Independent Union. The Board conducted a secret ballot vote in which the approximately 1000 workers then employed in that unit had the opportunity to say which union they wished to represent them. A majority of those who cast ballots selected the CPU, and the CPU's application for certification was granted on July 4, 1985.

3. The CPU and Carlton then entered into collective bargaining. They concluded a collective agreement which came into force on January 12, 1986, following a ratification vote among affected employees. That agreement included a "union shop" clause, which required as a condition of continued employment that all present employees become and remain members of the CPU and that all new employees apply for and maintain membership following completion of a probationary period. Apart from the identity of the union, these requirements are substantially the same as those of the union shop clause which appeared in the last collective agreement between Carlton and the Independent Union.

4. On January 14, 1986, notices were posted advising non-member employees in the bargaining unit of their obligation to join the union and directing them to the personnel office, where application cards were available. On February 3, 1986, employees who had not by then joined were sent a letter signed by Robert Smart, President of Local 322 of the CPU, advising them that if

they did not join by February 14th their failure to do so would become the subject of a grievance and their employment would be in jeopardy. On February 5th, employees who had not by then joined received a memorandum from Dieter Plautz, Director of Personnel for Carlton, advising them that failure to become a member could result in dismissal. The grievors received these letters and memoranda because at that point in time none of them had applied for membership in or became a member of the CPU.

5. On February 7, 1986, Tyrone D. Crawford wrote a "without prejudice" letter to Robert Smart, stating that he was solicitor for eight employees (the grievors and one other) who had received Smart's letter of February 3rd. He asked for "confirmation, in writing, of the specific section together with the name of the contract in question by which you have taken authority to serve notice upon my clients." He went on to say that he had a copy of the collective agreement between Carlton and the CPU, and made these arguments:

Nowhere does it state that an individual who does not sign a MEMBERSHIP APPLICATION CARD shall, or will, become a non-member of the Union or a member not in good standing. ... It states only that a member must pay dues. It is our contention that my clients are willing to pay dues and that you have the opportunity to collect the dues.

His letter concluded with a threat of court action "[i]f you persist in sending notices threatening my clients with expulsion from the Union, thereby placing their jobs in jeopardy...." Mr. Crawford acted as counsel for the complainant at the hearing of this complaint. He did not testify. It is not apparent how he got the notion in February that his clients were union members threatened with expulsion.

6. Gary Buccella is a full-time union representative employed by the CPU. He responded to Mr. Crawford's letter to Smart with a patient three page letter dated February 17, 1986. Its message was clear. The collective agreement required that Mr. Crawford's clients become members of the CPU in order to remain employed by Carlton in the unit of employees for which the CPU had been certified; to become members, they had to make an application and take an oath of membership. Mr. Crawford responded with a letter dated February 21, 1986 in which he said that Buccella's letter of February 17th "makes no sense concerning my request of February 7th", that he did not agree with Buccella's interpretation of the CPU constitution and that "[m]y clients are placing you on strict notice that failure to provide sufficient particulars regarding the signing of a membership application card will be treated as a nullity."

7. The union did file a grievance on February 17th. By memoranda dated March 4, 1986, Plautz advised Mr. Crawford's clients directly that Carlton was obliged to require membership in the CPU as a condition of employment and that their employment would be terminated on March 14th unless they provided Carlton with proof of membership or satisfied it that they were exempt from the provisions of the union shop clause. The union treated the delivery of these memoranda as a satisfactory settlement of its grievance. By subsequent memoranda to the grievors, Plautz extended their termination dates to April 1st for some and April 29th for others, in order to comply with the requirements of the *Employment Standards Act* with respect to notice of termination. Thereafter, four of the grievors took the steps necessary to become members of the CPU. Leslie Manders, Marsha Young and Sadie MacKay did not. Manders and Young were terminated on April 1st and MacKay was terminated on April 29th.

8. This complaint was filed April 2, 1986. Among other things, it alleged that both before and after February 3rd, each grievor had "verbally stated to Union and Employer officials that he or she is willing to comply with the terms of the Collective Agreement and the Constitution of the C.P.U." When the Board's hearing began, counsel for the complainant advised the Board and the

other parties that this phrase ought to have read “verbally stated to Union and Employer officials that he or she is *not* willing to comply with the terms of the Collective Agreement and the Constitution of the C.P.U.”, and asked that it be amended accordingly. He then demanded that the union and employer provide particulars of the reasons for the dismissals as requested in his letter to Smart of February 7, 1986, arguing that the grievors were entitled to know the case they had to meet. Counsel said his concern for particulars would be satisfied if the union and Carlton presented their evidence first. Rather than debate the point, and without conceding any obligation to do so, counsel for Carlton and Plautz (“the employer respondents”) and counsel for the CPU, Smart and Buccella (“the union respondents”) both agreed to proceed in that manner.

9. Counsel for the employer respondents recited the evidence his witness would give, which covered most, if not all, of the matters described in paragraphs 2 through 7 of this decision. Counsel for the complainant and counsel for the union respondents both agreed that his statement was accurate, which made calling the witness unnecessary. Counsel for the union respondents called Buccella, who testified that union shop clauses have for many years appeared in almost all collective agreements negotiated by the CPU and its predecessor. He explained that when there is a union security clause, each employee who is not a member is approached personally or by a notice to become a member. The employee is required to sign an application card, pay an initiation fee and take an oath. The oath may be taken at the time the card is signed or at a later time. The application card is sent to the union’s national office in Montreal, and in due course a membership card is sent to the employee. He stated that this was the practice which had been followed with respect to employees at Carlton after the collective agreement was ratified. That statement was not challenged by counsel for the complainant in cross-examination, nor was it put to Buccella that the taking of an oath or any other formality had been waived or overlooked in admitting any Carlton employee to membership. Cross-examination focused on the union’s interpretation of the provisions of its constitution and on whether the grievors knew before April 1, 1986, what the union’s requirements and practices were with respect to acquisition of membership.

10. Counsel for the complainant pursued the latter theme in his examinations of the three grievors whom he called as witnesses: Manders, MacKay and Rocha. Rocha testified that he knew what was required in order to become a member after seeing the letter Crawford received from Buccella. He signed an application card under protest on March 27, 1986 in the presence of Mr. Crawford, paid a one dollar initiation fee and took an oath. He was not terminated. Although Rocha said “everyone hasn’t taken an oath” in an unresponsive answer to a question in cross-examination, that allegation was not addressed by any evidence led by counsel for the complainant.

11. In answer to their own counsel’s questions, Manders and MacKay both testified that they did not know of the requirement of the oath before April 1st. In cross-examination, each of them said she could not recall seeing the letter their lawyer had received from Buccella in February setting out the steps by which membership is acquired. Each conceded, however, that she had never had any intention of joining the CPU, whatever that entailed, despite her awareness of the requirement in the collective agreement. Each made it clear that her unwillingness to join had nothing to do with a dispute over the nature of the required formalities. Manders said it was her belief that she could not be required to do anything more than pay dues.

12. In opening his argument, counsel for the complainant submitted that there were two issues, which he defined as follows:

Can an employee be compelled to join a union in order to work, notwithstanding his or her willingness to recognize the union as exclusive bargaining agent and pay dues, when he or she is unwilling to be a member?

Does the grievor know the case he has to meet or is he prejudiced by the ambiguity of the alleged violation?

On the first issue he had defined, counsel argued that exclusive bargaining rights and a requirement that all represented employees pay union dues are as far as a free and democratic society can go in compelling an unwilling employee to associate with a union. As authority that union membership could not be required, counsel cited section 2(d) of the *Canadian Charter of Rights and Freedoms* ("the Charter") and the decision of Mr. Justice White in *Re Lavigne and Ontario Public Service Employees Union et al.* (1986), 55 O.R. (2d) 449. He submitted that the decision in *Lavigne* stood for the proposition that compulsory check off could not be compelled, and said it followed that applying for membership could not be compelled. He did not argue that any provision of the *Labour Relations Act* was contrary to the Charter. The focus of his Charter argument was on the union security clause in the collective agreement.

13. In the argument he addressed to his second issue, counsel for the complainant invited the Board to find that the correspondence sent by the CPU and Carlton had not defined the "criteria for membership" or, alternatively, had not done so in sufficient detail. After referring to subsections 89(5), 1(1)(l) and 103(4) of the Act, counsel argued that the union must satisfy a number of criteria before this Board could "back up what the employer did to discharge an employee unwilling to satisfy a union security clause." He said that even if the requirements of the collective agreement are met, the union is obliged to advise the employer and the employer is obliged to satisfy itself that the "refusal by the employee to join the union was not contrary to any statutory or common law rules and was effected with due regard to rules of natural justice with respect to fair and proper procedure." This, he said, required that there be particulars in the union's notice to the employees and in its notice to the company sufficient to enable the company to satisfy itself that there was proper cause under the union's constitution and bylaws. He cited two arbitration decisions – *Orenda Engines Ltd.*, (1958), 8 L.A.C. 116 (Laskin) and *Franklin Mfg. Co. Ltd.* (1962), 12 L.A.C. 327 (Reville), both cases involving the expulsion or supposed expulsion of an employee from membership by the trade union – in support of the proposition that the employer in this case did not make appropriate enquiries before terminating the employment of the three discharged grievors. Finally, he submitted that employees cannot be terminated in a case like this without "some kind of hearing" involving the employees, the union and the employer.

14. Counsel for the complainant was asked by the Board to relate his arguments to the provisions of the Act which were specified in the complaint as having allegedly been violated. Those were sections 68, 70 and 71 and subsection 46(2)(f).

15. Section 68 of the Act provides:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

Counsel for the complainant argued that section 68 was violated by the union's failure to provide particulars and its insistence that the grievors become members when they did not want to do so. Section 70 of the Act provides:

No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

Counsel for the complainant argued that section 70 had been breached because, in his submission, statements that the grievors would be discharged if they did not comply with the collective agreement constituted coercion of the sort prohibited by that section. Section 71 provides:

Nothing in this Act authorizes any person to attempt at the place at which an employee works to persuade him during his working hours to become or refrain from becoming or continuing to be a member of a trade union.

This section had been breached, counsel said, because the membership requirement was discussed during working hours.

16. The provisions of section 46 to which argument was addressed are these:

46.-(1) Notwithstanding anything in this Act, but subject to subsection (4), the parties to a collective agreement may include in its provisions,

- (a) for requiring, as a condition of employment, membership in the trade union that is a party to or is bound by the agreement or granting a preference of employment to members of the trade union, or requiring the payment of dues or contribution to the trade union;

• • •

(2) No trade union that is a party to a collective agreement containing a provision mentioned in clause (1)(a) shall require the employer to discharge an employee because,

- (a) he has been expelled or suspended from membership in the trade union; or
- (b) membership in the trade union has been denied to or withheld from the employee,

for the reason that the employee,

• • •

- (f) has been discriminated against by the trade union in the application of its membership rules; or

• • •

Counsel's argument for the application of subsection 46(2)(f) rested on the assertion that none of the grievors had been offered a chance to take the oath until some time after other employees had taken the oath and become members. Thus, he argued, the union had discriminated against the grievors. He conceded that the evidence disclosed no other action by the union which could constitute discrimination in the application of its membership rules. He also argued that the use of the word "may" in the opening words of subsection 46(1) gives this Board some discretion whether to permit the inclusion in a collective agreement of a term of the sort described in paragraph (a) of that subsection.

17. This is a complaint filed under section 89 of the *Labour Relations Act*. That section gives this Board the power to inquire into an allegation that the Act has been contravened and to fashion a remedy for the contravention if satisfied that the allegation is true. The gist of the instant complaint is that the union and employer parties to a collective agreement have both violated the Act by enforcing and complying with a provision of the agreement which required membership in the union as a condition of employment of persons in the bargaining unit covered by that agreement.

18. Section 46 of the *Labour Relations Act* regulates the enforcement of provisions of this kind and prohibits agreements which include them in certain circumstances not present in this case. The *Labour Relations Act* does not require inclusion of such provisions in collective agreements in any circumstances. The provision in question here appears in the collective agreement between Carlton and the CPU because Carlton and the CPU agreed to it. Section 50 of the Act makes a collective agreement binding on the employer and union parties to it and on the employees in the bargaining unit defined in the agreement. Sections 44 and 45 ensure that either party to a collective agreement may resort to arbitration to enforce its provisions. Section 47 addresses the limited circumstances in which this Board can relieve against the application of certain types of union security provisions to particular employees. Subsection 46(1) does not itself confer on the Board any discretion to regulate or prohibit the inclusion or enforcement of provisions of the sort referred to in it. Subsection 46(1) does make it clear, if it is not otherwise, that the inclusion in a collective agreement of a provision of that sort does not contravene any other section of the Act.

19. Having regard to the complainant's pleading and the evidence, we found it most difficult to understand the relevance or applicability of their counsel's arguments about the union's alleged failure to give particulars and the employer's alleged failure to make enquiries. Counsel's repeated theme that the grievors did not know of the oath requirement before April was particularly incomprehensible, in light of the fact (which he conceded at the conclusion of the recital of facts by counsel for the employer respondents) that, as solicitor for the grievors, he was informed of the oath requirement by letter in mid-February. This is not a case in which the grievors failed to satisfy the membership requirement because they did not know, or could not discover, how to become members. They did not want to become members. Those of the grievors who ultimately agreed to become members "under protest" had no difficulty in ascertaining and satisfying the required formalities. The whole question of the degree of detail in the union's description of membership formalities was made quite irrelevant by the complainant's amended pleading that the grievors had told the union and the employer from the outset that they would not comply with the provisions of the collective agreement or the union's constitution.

20. On the evidence before us, the grievors at all times had the same opportunities to become members as were available to other employees, and on the same terms. They had reasonable notice of the requirement that they become members of the CPU if they wished their employment with Carlton to continue. They had a reasonable opportunity to comply with that requirement. The ultimate difference in treatment of the grievors was solely the result of their own decisions not to avail themselves of those opportunities. The CPU did not discriminate against the grievors in the application of its membership rules contrary to subsection 46(2)(f), nor did it in a manner which was arbitrary, discriminatory or in bad faith in the representation of the grievors contrary to section 68. Section 71 of the Act does not itself prohibit the activities described in it; there cannot be a "contravention" of section 71 about which a complaint under section 89 may be made. Having regard to the statutory provisions referred to in paragraph 18 of this decision, the action of the respondents in notifying employees of their obligations under the collective agreement and the consequences to them of non-compliance did not constitute "intimidation or coercion" within the meaning of section 70 of the Act: see, *Andrew Warren*, [1976] OLRB Rep. Jan. 963. If a party is entitled to enforce a provision against a person bound by the agreement, it can hardly be improper for that party to tell that person that it will do so.

21. Having regard to the evidence and the provisions of the *Labour Relations Act*, therefore, there has been no contravention of that Act and there is no reason or basis for granting the relief sought by the complainant. With respect to the complainant's rather superficial Charter argument, counsel for the respondents correctly observed that the result in the *Lavigne* case rested on the finding that the employer party to the collective agreement in question there was a crown agent

and on the court's conclusion that imposition of conditions employment on its employees by a crown agent was government action of the sort to which the Charter is directed. The *Lavigne* decision accepts the finding of the Ontario Court of Appeal in *Re Blaney and Ontario Hockey Association et al.* (1986), 54 O.R. (2d) 513, that by virtue of section 32 of the Charter, the Charter's provisions extend only to government action and do not impinge on private activity. Counsel for the complainant did not suggest that the actions complained of constituted government action, nor did he argue that any provision of the *Labour Relations Act* was made invalid by reason of the Charter. In *Re Bhindi et al. and British Columbia Projectionists Local 328* (1986), 29 D.L.R. (4th) 47, 86 CLLC 14,024, (B.C.C.A. - application for leave to appeal to S.C.C. denied November 6, 1986), the British Columbia Court of Appeal held that the Charter does not apply to a provision in a private sector collective agreement requiring membership in the union as a precondition of employment. Counsel for the respondents argued that the decision in *Bhindi* is a complete answer to the complainant's Charter argument. Counsel for the complainant offered no reply to these arguments. His Charter argument does not establish a violation of the *Labour Relations Act* and so cannot affect the result of our inquiry into this complaint.

22. Accordingly, this complaint is dismissed.

DECISION OF BOARD MEMBER J. A. RONSON;

1. I am constrained, by recent Court decisions, to agree with the decision of my colleagues.

2. I must admit that, in a case like this, I have some difficulty in understanding how the collective agreement escapes being subject to the provisions of the Charter.

3. The complainants were staunch supporters of Union #1. That union was displaced in a "raid" by Union #2. By virtue of statute, the complainants became bound to having Union #2, whom they did not support or want, become their bargaining agent. On their behalf Union #2 negotiated a clause in the collective agreement which required the complainants to become members of Union #2. And, as I understand the present law, that is legal because it is a "private" action by an organization which, but for governmental action, would have no authority to speak for the complainants.

4. It thus seems that an illegal action by government would be a legal action if carried out by a private body which is not an agent of the government but which derives its absolute authority from the government to so act "privately" for the complainants.

2024-86-R United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO-CLC, Applicant, v. Custom Foam Specialities Limited, Respondent, v. Group of Employees, Objectors

Certification - Petition - Board reviewing its jurisprudence in relation to petitions - Insufficient evidence to satisfy onus on the objecting employees to establish the voluntariness of the petitions - Board member setting out guidelines for valid petition

BEFORE: *G. T. Surdykowski*, Vice-Chairman, and Board Members *J. A. Rundle* and *B. L. Armstrong*.

APPEARANCES: *L. N. Gottheil*, *Reg Duguay* and *Bryan Senior* for the applicant; *Ian S. Campbell*, *Mary Ann Simon* and *David Germann* for the respondent; *Stuart L. Dollar* for the objectors.

DECISION OF G. T. SURDYKOWSKI, VICE-CHAIRMAN, AND BOARD MEMBER B. L. ARMSTRONG; December 9, 1986

1. This is an application for certification.
2. The name of the respondent is amended to: "Custom Foam Specialities Limited".
3. On the basis of the information before the Board, we find that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. Having regard to the agreement of the parties, the Board finds that all employees of the respondent at Kitchener, save and except foremen, persons above the rank of foreman, and office and sales staff, constitute a unit of employees of the respondent suitable for collective bargaining.
5. In accordance with the Board's Rules of Practice the respondent employer filed the requisite lists of employees in the bargaining unit, together with specimen signatures for the employees on those lists. Having regard to the material filed by the employer and the finding of the Board with respect to the bargaining unit description, the Board is satisfied that there were 37 employees in the unit at the time that the application was made.
6. In support of its application for certification, the applicant union filed documentary evidence of membership in the form of cards, which consist of combination applications for membership and attached receipts. The union filed 25 such cards, each of which bears the name of an employee in the bargaining unit. These cards each contain the original signature of an employee and the receipts, which are countersigned by a witness (the collector), indicate that a payment of \$1.00 has been made to the union in respect of membership fees within the six month period immediately preceding the terminal date for this application. The cards and money were collected by more than one person and the membership evidence is supported by a duly completed Form 9 Statutory Declaration which attests to the regularity and sufficiency thereof. In short, the form and content of the membership evidence are consistent with the requirements of section 1(1)(l) of the Act and, standing alone, demonstrates that the union has a level of support well in excess of that required by section 7(2) of the Act for certification without the necessity of holding a representation vote.
7. However, there were also filed with the Board 18 separate "statements of desire" or "petitions" (the terms are interchangeable) and each signed by one person and indicating opposition to the certification of the applicant. Seventeen of the individuals whose names appear on the

petitions are bargaining unit employees and of these, 7 had previously signed membership cards and paid \$1.00 in respect of membership in the applicant trade union and were therefore members during the material times. As explained below, it is those 7 petitions, which purport to indicate that the employees signing have had a change of heart and no longer wishes to support the application for certification, that might be relevant to the Board's considerations. It was readily apparent that if a sufficient number of the possibly relevant petitions were found to be voluntary, which is the litmus test of admissibility applied by the Board, they would raise sufficient doubt concerning the amount of continued support enjoyed by the applicant to prompt the Board to, in accordance with its usual practice, exercise its discretion to order a representation vote to resolve the matter.

8. The object in certification proceedings is to determine whether a majority of the employees found by the Board to be appropriate for collective bargaining wish to be represented by the applicant trade union in their employment dealings with their employer. The *Labour Relations Act* provides that the certification of trade unions in this Province is based primarily upon an assessment of the trade union's membership support as evidenced by membership records filed in support of an application. The Board does not inquire into opinions about the virtues of union membership except as evidenced by that documentary membership evidence and any timely petitions filed with respect to an application. In Ontario, as in most Canadian jurisdictions, the representation vote exists as a residual mechanism for ascertaining the wishes of bargaining unit employees in cases where either the applicant union does not have the support of more than fifty-five percent of the bargaining unit employees which is necessary for outright certification under section 7(2) of the Act (but does have the support of not less than forty-five percent of them) and where the circumstances are such that the Board sees fit to require such a vote to be held notwithstanding that there is documentary evidence showing membership support in excess of fifty-five percent. The Board's discretion in that respect must be exercised in the manner that is consistent with the Legislative primacy of the membership evidence as the means by which employee wishes with respect to certification are determined.

9. The realities of labour relations are such that the employees can and do change their views as to the desirability of trade union representation. In recognition of this, the Board has developed a procedure which recognizes the validity of union membership cards but retains flexibility to seek the confirmatory evidence of a representation vote where employees file a timely petition which indicates a change of heart.

10. Unlike union membership evidence, petitions are not directly or precisely regulated by the Act. There is no statutory definition equivalent to section 1(1)(l), nor is there any requirement that the Act of signing be confirmed either by monetary payment or otherwise. There is also no statutory declaration analogous to Form 9 (which attests to the regularity and sufficiency of membership of evidence). However, the existence of such statements is contemplated by sections 103(2)(j) and 111(l) of the Act and Rule 73 of the Board's Rules of Procedure. The Board has a long established practice of accepting such petitions and exercising its discretion to order a representation vote where the petitions are voluntary and they contain a sufficient number of signatures of persons who had previously signed union membership cards to create a doubt as to the actual level of support enjoyed by the applicant trade union. The Board must be satisfied that persons indicating an apparent change of heart did so voluntarily and without being motivated by a perceived threat to their job security, a concern that the employer is involved in the petitions, or that a failure to sign could result in reprisals. It is only those bargaining unit employees who first signed union membership cards and subsequently signed petitions whose signatures are relevant to the Board's considerations. This is because employees for whom no membership evidence is filed are treated as being opposed to the application. Consequently, the signature of a non-union member

on a petition can add nothing to the assessment of the support enjoyed by the union applying for certification.

11. The Board's treatment of petitions as described aforesaid has been explained in previous Board decisions (see for example, *Unlimited Textures Company Limited*, [1984] OLRB Rep. Jan. 138 at paragraphs 15, 16 and 17). The onus of establishing that a petition is voluntary is on the employees objecting to certification. To do so, they must call witnesses to give evidence, based on personal knowledge and observation, relating to the circumstances of the origination and preparation of the petition, and the manner in which *each* signature was obtained. The cases are legion in which a failure to appear and give satisfactory firsthand evidence regarding the origination and circulation of a petition has resulted in its rejection. Each and every signature on a petition must be identified and the circumstances under which it was obtained must be recounted by a person having personal knowledge thereof. Where such evidence is not presented, the signature may, and likely will, be discounted. In addition, the circulation of petitions must be free from the actual or perceived influence of management. Consequently, the Board will discount the signature of any employee who is, or is perceived to be, managerial. Similarly, where managerial personnel, or persons who are perceived as having a greater proximity to management than other employees, are involved in originating or circulating a petition, it is difficult to escape the conclusion that the employees would reasonably have perceived the petition to be supported by the employer and its reliability as a gauge of employee desires will be destroyed (see, Rule 73(5); *Radio Shack*, [1978] OLRB Rep. Nov. 1043; *Baltimore Aircoil Interamerican Corporation*, [1982] OLRB Rep. Oct. 1387; *Lo Food Division of Lumsden Brothers Limited*, [1983] OLRB Rep. May 676; *Markham Hydro Electric Commission*, [1984] OLRB Rep. Oct. 1481).

12. Paragraph 7 of the Form 6 Notice to Employees of Application for Certification and of Hearing posted by the respondent as required by the Board's Rules of Practice explicitly informs objecting employees that it is necessary to call witnesses who can testify from personal knowledge as to the circumstances of the origination and circulation of the petitions filed by them. In this proceeding, the group of employees, who were represented by counsel throughout, called one witness, Tim Kipfer, to give evidence on their behalf. Mr. Kipfer is a cutfoam operator, which position is within the bargaining unit described in paragraph 4 *supra*, who has been employed by the respondent since July 7, 1986. Not only were there substantial gaps in the evidence of Mr. Kipfer, but the reliability of the evidence that he was able to give is suspect because of his inability to recall accurately or at all things that happened a relatively short time ago (for example, his recollection of what transpired when he was interviewed for a job with the respondent is inconsistent with the evidence of Mr. Germann, whose evidence we accept as being correct). Mr. Kipfer had either no knowledge or no recollection of many significant details with respect to the petitions. He did not know where the petitions came from; where, how, or by whom they were prepared; or even who he got them from. Although he was certain that he was in fact present when each and every signature was obtained, Mr. Kipfer could not specifically recall being present when many of the signatures were obtained. When questioned with respect to the circumstances under which the signatures were obtained, he was unable to recollect when or where any of the signatures identified as P2, P3, P5, P6, P9, P10, P11, P12, P15, P17 and P18 (referred to in this manner to preserve the confidentiality of the identity of the persons who allegedly opposed certification in accordance with section 111(1) of the Act) were secured, or what, if any, discussions took place with, or in the presence of, any of those individuals before they signed the petition.

13. Mr. Kipfer did recall that the signatures of P1, P7, P8, P13, P14 and P16 were obtained at the conclusion of a meeting held at P13's home on October 24, 1986. However, Mr. Kipfer did not assist in arranging the meeting and stated that he did not know how or by whom it was organized, or what was said to employees to induce them to attend. With respect to the meeting itself,

Mr. Kipfer could recall only that some people spoke in favour of the union and some against. According to him, that some benefits might be lost and that there might be a strike if the union's application was successful were points raised but the primary thrust of the meeting was to persuade employees to sign a petition in order to delay the matter so that more information could be obtained from both the union and the company and a representation vote be held. Mr. Kipfer had no other recollection as to what transpired at the meeting prior to the signing of the petitions noted above. Specifically, he could not recall any discussions with, or in the presence of, those employees who did sign a petition at the conclusion at the meeting. Finally, Mr. Kipfer testified that P4 signed a petition at that individual's apartment. Again he could not recall how he happened to be at P4's apartment or what discussions there were with, or in the presence of, P4 during the hour to hour and a half that he was there. He did recall, however, that Jim Bell, who he identified as his supervisor and who was referred to in the evidence of Mr. Germann, who gave evidence on behalf of the respondent, as being a "foreman", and Mike Nagles attended at P4's apartment with him.

14. Mr. Kipfer was able to tell the Board that Mr. Bell telephoned him on October 24, 1986, to discuss his participation in circulating the petitions and the meeting of October 24, 1986, that Mr. Nagles conducted the meeting, and that Mr. Bell and Mr. Nagles did a large proportion of the talking at that meeting. He also testified that both Mr. Bell and Mr. Nagles were present or in the immediate vicinity when *all* of the signatures on the petitions were obtained. It was also Mr. Kipfer's understanding that Mr. Nagles and Mr. Bell consulted and retained a solicitor, Mr. Dollar, with respect to the matter shortly after the Form 6 Notice to Employees was posted by the respondent.

15. Because Mr. Kipfer had only been employed by the respondent for a relatively short time, he did not know many of his fellow employees at the time that this application was made. Indeed he admitted that he could not be sure that all of the persons who attended the October 24, 1986 meeting were bargaining unit employees. According to Mr. Kipfer, and counsel for the objecting employees, it was *because* he was new, that Messrs. Nagles and Bell selected Mr. Kipfer to be what can be characterized as the "front man" for the petitioners in this proceeding. On the evidence, it is abundantly clear that it was Messrs. Nagles and Bell who were the persons instrumental in originating and circulating the petitions before the Board. It was these two individuals who orchestrated the alleged opposition to this application for certification by recruiting Mr. Kipfer; by making arrangements for the collection of signatures, including consulting and retaining counsel, and arranging for and conducting a meeting of employees for the purpose of obtaining signatures on petitions; by being present at, or in the immediate vicinity of, the signing of each petition; and by taking custody of the signed petitions from Mr. Kipfer after all of the signatures had been obtained. Notwithstanding the significant roles played by these two individuals, the Board did not have the benefit of testimony from either of them, even though Mr. Nagles was present throughout the proceedings. Consequently, the Board is left with no evidence regarding the origination of the petitions and very little evidence of the circumstances surrounding the signing thereof. There is therefore insufficient evidence of the origination and circulation of the petitions before us to satisfy the onus on the objecting employees to establish the voluntariness of any of the 18 petitions. In arriving at our conclusions we find it unnecessary to consider the issue of Jim Bell's actual or perceived managerial status as a basis for impugning the reliability of the petitions as an indicator of employee wishes.

16. In the result, the Board is not prepared to give any weight to the petitions as indicators of the wishes of those union members who signed one. The Board is satisfied that the applicant trade union has demonstrated the required level of membership support to warrant certification without the necessity of holding a representation vote.

17. The Board is therefore satisfied, on the basis of all the evidence before it, that more than fifty-five percent of the employees of the respondent in the bargaining unit at the time that the application was made were members of the applicant on October 27, 1986, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

18. A certificate shall issue to the applicant.

DECISION OF BOARD MEMBER J. RUNDLE;

1. Based on the evidence placed before the Board, I concur with the result of the majority, however, I feel it worthwhile to set out, in general terms, the tests the Board requires to be meticulously followed in order to have a petition validated so as to secure a secret vote:

1. the person circulating the petition cannot discuss it with the employer;
2. the person circulating the petition should not obtain signatures on company property;
3. the person circulating the petition should not obtain signatures within sight of a member of management;
4. every signature in the petition must be witnessed and such witness must testify before the Board on matters relating to the preparation of the petition, the obtaining of signatures and the circulation of the document in question;
5. the petition must not leave the person's hand who circulates it - if it does, then the person it is given to must appear before the Board to give evidence;
6. the person circulating the petition must not get time off from work in order to mail the petition by registered mail (the petition must be sent by registered mail to the Board);
7. the person circulating the petition must *not* arrange for time off with pay to attend the Board hearing;
8. should the person circulating the petition have any member of management sign it for whatever reason (even if the member of management believes he or she is in the bargaining unit) then all signatures secured subsequent to that of the member of management are disregarded by the Board, and;
9. the person circulating the petition is subjected to rigorous cross-examination by the Board on questions pertaining to the origination, preparation and circulating of the petition.

2. The foregoing paragraphs may give the petitioners some indication of the technicalities which they have to meet in order for a petition to succeed.

2362-86-R International Union of Bricklayers and Allied Craftsmen, Local 7 Canada, Applicant, v. E/E Fradema Masonry, Respondent

Bargaining Unit - Certification - Construction Industry - Applicant seeking certification in two Board geographic areas while employees only existing in one - Geographic area in which no employees were employed as of the application date is not an appropriate geographic area within the meaning of s.144(1)

BEFORE: *Harry Freedman*, Vice-Chairman, and Board Members *D. A. MacDonald* and *J. Redshaw*.

DECISION OF THE BOARD; December 23, 1986

1. In this application for certification the applicant filed two certificates of membership. The certificates are signed by the members and indicate that monthly dues of \$22.00 have been paid for at least one month within the six-month period immediately preceding the terminal date of the application. The certificates are checked and certified correct by an officer of the applicant. The applicant also filed a duly completed Form 80, Declaration Concerning Membership Documents, Construction Industry.

2. The respondent failed to file a reply, a list of employees and specimen signatures within the time fixed in accordance with the *Labour Relations Act* and the Board's Rules of Procedure.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on April 12, 1978, the designated employee bargaining agency is the International Union of Bricklayers and Allied Craftsmen and The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen.

4. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

(a) an employee bargaining agency; or

(b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

5. The applicant seeks certification in respect of the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all other sectors of the construction industry, save and except the industrial commercial and institutional sector, in the Regional Municipality of Ottawa-Carleton and the Counties of Prescott, Russell, Stormont, Glengarry and Dundas. That area is comprised of two Board geographic areas, Board Area 15 and 31,

that have been developed by the Board since 1962 pursuant to section 119(1) of the Act. See *Klimack Construction Limited*, [1986] OLRB Rep. Sept. 1238 at 1239.

6. Paragraph 6 of the application states that the employees affected by the application were working at "various locations throughout the Regional Municipality of Ottawa-Carleton". Board Area 15 is defined as the Regional Municipality of Ottawa-Carleton, and the Counties of Prescott and Russell. Board Area 31 is defined as the United Counties of Stormont, Dundas and Glengarry. It is apparent from the application that there were no employees in Board Area 31 on the application date.

7. An application for certification under section 144(1) must be made in respect of employees in the industrial, commercial and institutional sector together with employees in at least one other geographic area. In our opinion, an "appropriate geographic area" must mean, at the very least, an area in which employees were employed on the application date. It seems to us that a geographic area in which no employees were employed as of the application date is not an appropriate geographic area. In this regard, see the Report to the Minister of Labour by G. W. Adams, Special Counsel, April 11, 1980 at pages 26-29. Therefore, in the circumstances of this case, the Board is satisfied that the appropriate geographic area within the meaning of section 144(1) is only Board Area 15, that is, the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell.

8. Therefore, the Board finds, pursuant to section 144(1) of the Act, that all bricklayers and bricklayers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers and bricklayers' apprentices in the employ of the respondent in all other sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

9. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on December 5, 1986, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

10. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 3 above in respect of all bricklayers and bricklayers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

11. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant

trade union in respect of all bricklayers and bricklayers' apprentices in the employ of the respondent in all sectors of the construction industry excluding the industrial, commercial and institutional sector in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman.

1767-86-FCA United Brotherhood of Carpenters and Joiners of America, Local 2679, Applicant, v. Egan Visual Inc., Respondent

First Contract Arbitration - Interest Arbitration - Concept of final offer selection not applicable under s.40a - Collective agreement not reflecting relative strengths of bargaining positions of the parties

BEFORE: *R. A. Furness*, Vice-Chairman, and Board Members *J. Redshaw* and *G. Shamanski*.

APPEARANCES: *Jim Nyman*, *Michael Church*, *T. G. Harkness* and *Sergio Lilliani* for the applicant; *Howard Levitt*, *Jeff Reeves* and *Gerry Egan* for the respondent.

DECISION OF THE BOARD; December 1, 1986

1. On September 11, 1986, the Board received a request to arbitrate a first collective agreement. This request arose as the result of a memorandum of agreement between the applicant and the respondent. In Board File No. 0335-86-R an employee filed an application for a declaration terminating bargaining rights. In File No. 0919-86-FC the applicant filed an application requesting the Board to direct settlement of a first collective agreement by arbitration. In the memorandum of agreement it was agreed that the application for a first collective agreement should be settled by arbitration filed by the applicant and it should be adjourned pending the determination of a representation vote with respect to the application for a declaration terminating the bargaining rights of the applicant. Moreover, the parties agreed to waive the time limits set out in section 40a(8) of the Act. It was agreed that if more than fifty per cent of the ballots cast were in opposition to the applicant, the Board should declare that the applicant no longer represented the employees in the bargaining unit in accordance with section 57(4) of the Act and that the applicant would withdraw the request filed with the Board for a first collective agreement to be settled by arbitration. It was further agreed that if fifty per cent or less of the ballots cast were in opposition to the applicant then the applicant should continue to be the legal representative to represent the employees in the bargaining unit. It was also agreed that if the applicant won the representation vote, then the first collective agreement should be settled by arbitration.

2. This first contract arbitration was referred to the Board on the agreement of the applicant and the respondent. The hearing dates were set for October 6, 7 and 10, 1986, which meant that pursuant to section 40a of the Act, the decision date would have been required on November 20, 1986. However, three additional days were required to complete this arbitration before the Board and the last date for hearing and argument before the Board was November 3, 1986. In these circumstances, pursuant to section 40a(19) of the Act, the parties agreed in writing to extend the time limits set out under the Act for the release of a decision by the Board to December 1, 1986.

3. It would be unwise for the Board to attempt to definitively set forth the contents of a collective agreement which are applicable to all circumstances. As more first contract arbitrations are filed with the Board, no doubt criteria will arise as a result of experience in a greater number of situations. There are no statutory guidelines in the Act which require the Board to have regard to a given standard of comparison. The Board would, however, adopt the language set forth in *Burlington Northern Air Freight (Canada) Ltd.*, [1986] OLRB Rep. Oct. 1327. In that case the Board indicated that it had adopted a somewhat similar approach to the reasoning of the British Columbia Labour Relations Board in *London Drugs Ltd.*, [1974] Can.LRBR 140 at page 147. The Board agrees that applications under section 40a of the Act with respect to a first contract arbitration by the Board should not be used to achieve major breakthroughs in collective bargaining, but rather, the Board would try to settle the terms of a collective agreement which reflect a fairly general consensus as to what should be the contents of a collective agreement having regard to the particular circumstances of each collective bargaining situation. The Board also agrees that the terms of the collective agreement should be sufficiently attractive to the employees who are in the bargaining unit defined in the collective agreement that they would give serious consideration before deciding to terminate the bargaining rights of the applicant.

4. The arguments which were addressed to this Board were extremely helpful and of assistance in enabling the Board to reach a conclusion on the points in issue as related by the parties. However, the Board does desire to comment on some of the positions taken by the respondent. Firstly, the Board does not agree that the process envisaged under a determination of a first contract by this Board under section 40a of the Act is to be based upon the concept of a final offer selection. In attempting to set forth a collective agreement which is, in the Board's view, fair to both sides, it is not sufficient for the Board to simply look at the most attractive or the least unattractive proposal of either side. Secondly, the Board also rejects the argument of the respondent that the collective agreement which the Board determines under section 40a ought to reflect the relative strengths of the bargaining positions of the parties. In this case, it was the position of the respondent that it was in the stronger bargaining position and that, therefore, the determination of the Board should wholly or substantially reflect the proposals advanced by the respondent. The Board rejects this notion because the imbalance of the bargaining position of the parties was certainly a factor in the inability of the parties to conclude a collective agreement which was satisfactory and acceptable to both sides. If the Board were to accept the argument of the respondent that the collective agreement determined by the Board ought to reflect the relative bargaining positions of the parties then there would be little point in having an application made for a first collective agreement pursuant to section 40a of the Act since the parties would know in advance the collective agreement which would be determined by the Board. Moreover, an endorsement of the concept of the relative bargaining positions of the parties would encourage extreme positions by the parties which perceive themselves to be the stronger position.

5. The Board has considered all of the material which was filed before it and has made the determinations with respect to the articles in dispute as set forth. In article 5 with respect to union dues, the Board has determined that there should be the checkoff as required under the Act. The applicant has sought a union shop and the respondent, in objecting to this provision, has argued that such a provision would infringe the Charter of Rights. It is unnecessary for the Board to determine the constitutional argument since it has determined that the collective agreement will not contain a union shop provision. The Board has considered the fact that there is a considerable body of employees as reflected by the recent result of the termination representation vote to the applicant as the bargaining agent, who oppose the applicant. It would be unfair in these circumstances where the applicant does not enjoy a preponderance of support in a plant to confer a closed shop provision on the employees who are affected by the collective agreement. In article 14, Jury and Witness Duty, the Board has determined that the simpler provisions as proposed by the res-

pondent are appropriate. It is the view of the Board that an employee should fulfill his civic duty by serving as a juror in any court of law and that when required to attend as a witness of the Crown, he should not suffer any loss of remuneration. The proposal of the applicant that this provision extend to a broader area of attendance before the courts is not appropriate. In article 15, The Negotiating Committee, the Board determines that the provision essentially proposed by the respondent is the appropriate one. Up to three employees may be designated by the applicant as a negotiating committee. However, the Board from the evidence before it, was not able to conclude that the proposal for such absence on a negotiating committee be remunerated was at all common in collective agreements. In article 16, Holidays, the Board has determined that the number of paid holidays should be as proposed by the respondent. However, there is a letter of understanding which is to be executed by both sides to the effect that in the event that the employer changes from a four-day week to a five-day week, then the parties will negotiate a change to reflect this. This is a particularly important area for paid holidays which fall on a Friday. Friday, at the present time, is not a day of operation for the respondent. In article 16, Vacations with Pay, the language in this article reflects the language which the parties themselves refined and agreed to at the commencement of the hearing before the Board. No further comment is required. In article 18, Health and Welfare, the respondent has provided for some time a health and welfare benefit programme for its employees. It has proposed to increase the benefits under this programme while insisting that the employees contribute 0.9 per cent of their gross salary as a contribution towards the cost of these benefits. The more costly and generous proposal by the applicant, in our view, is not appropriate for a first collective agreement. Rather, it is a matter of seeking to improve the present health and benefit programme in future collective bargaining. In article 19, No Strikes or Lockouts, the philosophy of the respondent in this area appears to be, possibly as a result of a recent lawful strike, essentially defensive. The respondent claims that it has experienced a decline in productivity due to slowdowns by the employees while awaiting the conclusion of a first collective agreement. The Board did not inquire into the substance of this position by the respondent. However, the Board notes that the respondent has not filed any application before the Board with respect to a cease and desist order for an unlawful strike. The respondent sought in the language proposed to have the applicant bear a responsibility for the anticipated slowdowns and/or strikes in the future. In our view, this is negative thinking by the respondent and it also fails to take into account that a trade union is frequently not responsible for the conduct of employees. However, a responsible trade union, and the Board has no reason not to include the applicant in such a classification, seeks to lead and influence and establish modes of behaviour for employees in the bargaining unit. The article on strikes and lockouts therefore provides that there should be no strikes and no lockouts during the collective agreement and instead of the elaborate language proposed by the respondent in the collective agreement, the Board has set forth the definition of strike and lockout as contained in the *Labour Relations Act* and has included that in this article. In our view, the definition of strike and lockout is sufficiently clear to indicate to the parties and to the employees the proscription on unlawful strikes and lockouts under the *Labour Relations Act*. In article 22, Wages, there can be little doubt that this was the most contentious provision in the items in dispute before the Board. The information which was presented to the Board and which was provided almost exclusively by the respondent was in a form that was difficult to understand and it was also difficult for the Board to make meaningful comparisons. The Board heard a great deal of evidence on the increases which had been paid to employees over the last two years and the Board also heard a great deal of evidence on the very subjective classifications and reclassifications adopted by the respondent with respect to its employees. The effect of the wage proposal under this collective agreement by the respondent led, for example, to the red circling of a number of employees with the result that these employees would not receive any increases in pay over the two-year life of the collective agreement. In our view, this is completely unacceptable and no trade union should be required to accept a collective agreement which discriminates against employees on totally subjective criteria adopted by an employer. In assessing the evidence before us, particularly the figures

provided with respect to wages paid in the manufacturing sector, the Board has determined that employees covered by this collective agreement will receive on December 1, 1986 an increase in their hourly rate of four per cent and that they shall receive a further increase in pay on their hourly rate of three per cent on December 1, 1987. The applicant had requested retroactive pay to February of this year. In our view, the percentage increases referred to adequately compensate the employees and there will be no retroactivity in pay. Before leaving the subject of wages, the Board notes that the employer argued that it did not have the ability to pay the increases requested by the applicant together with retroactivity. The Board observes that where an employer argues inability to pay, it should be prepared to present figures to substantiate that position. In the instant case, the Board received an unsigned letter from a firm of chartered accountants which gave percentage profits for various years and also received oral testimony from Gerry Egan. The evidence dealt with generalities and, as stated earlier, the evidence with respect to inability to pay was neither clear nor impressive. In article 15, Working Rules, the Board has decided to include the working rules proposed by the respondent. However, to balance what appears to be an authoritarian stance on matters of discipline by the respondent, the Board has included the applicant's proposed grievance procedure and arbitration in article 7 as a fair counterbalance to the position of the respondent on discipline. The purpose of article 7 is to confer a measure of discretion on an arbitrator when a matter comes before him with respect to the suspension or termination of an employee. The claim of the respondent to have absolute control over the employees in matters of discipline is not one which is generally accepted in the labour relations community. It is generally accepted, in our view, that a trade union has a role to play in protecting an employee from unfair discipline by an employer. Moreover, in our view, when an employer refuses to acknowledge the role of a trade union in representing an employee in matters of discipline, it undermines the role of a trade union as the freely selected bargaining agent for its employees. The Board has not included a subcontracting clause. The applicant and the respondent had both proposed different articles. It appears to the Board that there is not a great likelihood of the employer subcontracting any appreciable amount of work. The applicant and the respondent may utilize the arbitration provisions of the collective agreement and the provisions of the *Labour Relations Act* if problems arise.

6. The Board has endeavoured to provide a first collective agreement which will prove to be practical and fair and which will provide a basis for a collective bargaining relationship which extends beyond November 30, 1988. Collective agreements which are freely negotiated by the parties are always preferable to collective agreements which are imposed on the parties. The Board reminds the parties that under section 52(5) of the Act, there is nothing to prevent the parties from revising, by mutual consent, any article in this collective agreement other than the article which provides for the period of operation of this collective agreement. Above all, it is the Board's hope that since this is a first collective agreement which has been imposed by the Board, that the parties will immediately establish channels of communication with regular meetings in an attempt to fully understand and develop the concerns of each other. Collective bargaining is an ongoing process which culminates when it is time to renew a collective agreement. However, the reality is that collective bargaining is an ongoing process which continues throughout a relationship between an employer and a trade union. Attached as an Appendix is a collective agreement and a letter of understanding which is contained therein for the applicant and the respondent to sign.

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[Collective agreement omitted: Editor]

1267-86-R; 1269-86-R; 1271-86-R; 1272-86-R; 1274-86-R; 1276-86-R; 1278-86-R; 1279-86-R; 1280-86-R; 1281-86-R; 1282-86-R; 1283-86-R; 1284-86-R; 1286-86-R; 1287-86-R; 1288-86-R; 1290-86-R; 1291-86-R; 1292-86-R; 1293-86-R; 1843-86-R; 1845-86-R Great Lakes Fishermen and Allied Workers' Union, Applicant, v. Omstead Foods Limited, Respondent; Great Lakes Fishermen and Allied Workers' Union, Applicant, v. F. Causarano Fishery Limited, Respondent; Great Lakes Fishermen and Allied Workers' Union, Applicant, v. C.P. Fisheries Ltd., Respondent; Great Lakes Fishermen and Allied Workers' Union, Applicant, v. A. Figliomeni & Sons Limited, Respondent; Great Lakes Fishermen and Allied Workers' Union, Applicant, v. 649857 Ontario Ltd., c.o.b. Jerry Liddle Fishery and 649858 Ontario Inc., c.o.b. Jack Liddle Fishery, Respondents; Great Lakes Fishermen and Allied Workers' Union, Applicant, v. 504578 Ontario Limited, operating as Murray Collard Fisheries, Respondent; Great Lakes Fishermen and Allied Workers' Union, Applicant, v. Murray & Ken Loop Fishery Ltd., Respondent; Great Lakes Fishermen and Allied Workers' Union, Applicant, v. Batista Fisheries Ltd., Respondent; Great Lakes Fishermen and Allied Workers' Union, Applicant, v. Four Brothers Fishing Co. Limited, Respondent; Great Lakes Fishermen and Allied Workers' Union, Applicant, v. Franklin Fishery (Wheatley) Inc., Respondent; Great Lakes Fishermen and Allied Workers' Union, Applicant, v. Remeloso and Sons Fisheries Ltd., Respondent; Great Lakes Fishermen and Allied Workers' Union, Applicant, v. H. Tiessen Fisheries Ltd., Respondent; Great Lakes Fishermen and Allied Workers' Union, Applicant, v. Presteve Foods Limited, Respondent; Great Lakes Fishermen and Allied Workers' Union, Applicant, v. James Taylor Fishery Ltd., Respondent; Great Lakes Fishermen and Allied Workers' Union, Applicant, v. Simmons Fishery Ltd., Respondent; Great Lakes Fishermen and Allied Workers' Union, Applicant, v. 389565 Ontario Ltd. c.o.b. as Jose Cabral Fisheries, Respondent; Great Lakes Fishermen and Allied Workers' Union, Applicant, v. Harvey Getty and Sons Ltd., Respondent; Great Lakes Fishermen and Allied Workers' Union, Applicant, v. Favignana Fishing Co. Limited, Respondent; Great Lakes Fishermen and Allied Workers' Union, Applicant, v. 538391 Ontario Inc., Respondent; Great Lakes Fishermen and Allied Workers' Union, Applicant, v. Family Fishery Company, Respondent; Great Lakes Fishermen and Allied Workers' Union, Applicant, v. Philcox & Elsley Fishery Ltd., Respondent; Great Lakes Fishermen and Allied Workers' Union, Applicant, v. S. Catrini Fisheries Inc., Respondent

Certification - Constitutional Law - Whether labour relations of fishing boat crews within provincial or federal jurisdiction - Whether fishing falls within statutory exclusions of hunting and trapping - Board having jurisdiction to hear application on basis that labour relations in fisheries is within provincial jurisdiction

BEFORE: *Patricia Hughes*, Vice-Chairman, and Board Members *W. G. Donnelly* and *J. Sarra*.

APPEARANCES: *Laurence C. Arnold* and *Michael Darnell* for the applicant; *Rodney M. Godard* for *A. Figliomeni & Sons Limited* (1272-86-R), *Four Brothers Fishing Co. Limited* (1280-86-R),

Favignana Fishing Co. Limited (1291-86-R) and S. Catrini Fisheries Inc. (1845-86-R); *Brian P. Nolan* for 504578 Ontario Limited, operating as Murray Collard Fisheries (1276-86-R), H. Tiessen Fisheries Ltd. (1283-86-R) and Presteve Foods Limited (1284-86-R); *D. S. Jovanovic* and *Pam Krause* for F. Causarano Fishery Limited (1269-86-R), Murray & Ken Loop Fishery Ltd. (1278-86-R), Batista Fisheries Ltd. (1279-86-R), Franklin Fishery (Wheatley) Inc. (1281-86-R), James Taylor Fishery Ltd. (1286-86-R), Simmons Fishery Ltd. (1287-86-R), Harvey Getty & Sons Ltd. (1290-86-R) and Philcox & Elsley Fishery Ltd. (1843-86-R); *R. Gary McLister* for C. P. Fisheries Ltd. (1271-86-R), 538391 Ontario Limited (1292-86-R) and Family Fishery Company (1293-86-R).

DECISION OF THE BOARD; December 9, 1986

1. In these certification applications (except File Nos. 1843-86-R and 1845-86-R), the applicant Great Lakes Fishermen and Allied Workers' Union ("the union") requested and the Board directed, by decisions dated September 4, 1986, that pre-hearing representation votes be held. Those votes were held on September 20, 1986 and the Board began hearings into the objections to the votes raised by the respondents herein ("the boat owners" or "the employers") and into matters arising out of the conduct of the votes on October 21, 1986. (The votes in File Nos. 1843-86-R and 1845-86-R were directed by decisions dated October 20, 1986 and October 24, 1986, respectively, and were held on November 5, 1986; by the date of hearing of the matters dealt with by these decisions, matters arising out of the conduct of these votes had not, of course, been raised by the parties.) By decision dated November 4, 1986, the Board confirmed oral decisions made on October 21, 1986, declining to order a stay of the proceedings before the Board until judicial proceedings by certain respondents with respect to the power of the Board to determine whether it has the constitutional jurisdiction to deal with these applications had been decided, as requested by the respondents herein, and declining to require notification of the Attorneys General of Ontario and Canada of these proceedings, as requested by the applicant.

2. The majority of respondents herein have challenged the Board's jurisdiction to hear these applications on the basis that labour relations in fisheries is a matter within the jurisdiction of Parliament. The respondents in File Nos. 1267-86-R, 1274-86-R, 1282-86-R, 1284-86-R and 1288-86-R, have not challenged the Board's jurisdiction. However, those respondents were advised by the Board that it would entertain any submissions they wished to make on the issue of constitutional jurisdiction. Counsel for the respondents in File Nos. 1267-86-R and 1288-86-R informed the Board that he would not be making submissions. The respondents in File Nos. 1274-86-R and 1282-86-R did not appear before the Board. Counsel for respondents in File Nos. 1269-86-R, 1271-86-R, 1272-86-R, 1278-86-R, 1279-86-R, 1280-86-R, 1281-86-R, 1286-86-R, 1287-86-R, 1290-86-R, 1291-86-R, 1292-86-R, 1293-86-R, 1843-86-R and 1845-86-R informed the Board that they adopted the position in this matter of counsel in File Nos. 1276-86-R and 1283-86-R, Mr. Brian Nolan; Mr. Nolan later informed the Board that he had been asked to act as agent for the respondent in 1284-86-R on the jurisdictional matter.

3. In addition to the constitutional challenge, the respondents in File Nos. 1272-86-R, 1280-86-R, 1291-86-R and 1845-86-R submitted that crews on fishing boats are excluded from the application of the *Labour Relations Act* ("the Act") by virtue of section 2(b) of the Act.

4. Argument with respect to the constitutional challenge and evidence and argument with respect to the jurisdictional challenge under section 2(b) of the Act were heard on November 6 and 7, 1986. Our rulings on those objections and reasons therefor are set out in this decision.

I. "Fishing" and Section 2(b) of the Act

5. We deal first with the contention that section 2(b) of the Act applies to the employees who are the subject of these applications. Section 2(b) states as follows:

2. This Act does not apply,

...

(b) to a person employed in agriculture, hunting, or trapping.

Counsel for the respondents in File Nos. 1272-86-R, 1280-86-R, 1291-86-R and 1845-86-R, Mr. Rodney Godard, restricted his argument to the position that fishing crews are employed in hunting or trapping. He called as a witness Mr. Henry Tiessen who operates a commercial fishing business and who explained to the Board the methods used by him and other fisherpersons to catch fish, including the use of gill nets, trap nets and trawls. The union did not call evidence. In argument, Mr. Godard referred to the definitions of "fish" in various "fishery" statutes and the scope of those statutes. For example, the Ontario *Fisheries Inspection Act* defines "fish" to include mammals or any living thing in the water. He pointed out that the words used in section 2(b) are general in nature; there is no restriction on species or method (the section does not exclude "hunting of animals" or "trapping of fur-bearing animals", for example) and argued that the relevant question is whether the actual process used in fishing falls within the terms of section 2(b). He submitted that since the legislation regulating methods of fishing contemplates that fish may be hunted or trapped, an inference can be drawn that "fishing" can be read into section 2(b) of the Act. Union counsel urged the Board to apply the usual principle of statutory construction that the ordinary meaning of a word is the meaning to be accorded the language of section 2(b). He argued that although methods of fishing may include traps and other such implements, they do refer to means of fishing and not to the activities of trapping or hunting. We accept union counsel's argument that with respect to fishing, "traps" refer to methods of fishing and not to the activity of trapping or hunting. In our view, section 2(b) is clear on its face that it does not include fishing; we further apply the principle that an exception to the operation of legislation should be interpreted narrowly and therefore we find that persons employed in fishing are not excluded from the operation of the Act by section 2(b) of the Act.

II. The Constitutional Challenge

6. We now consider the constitutional challenge to the Board's jurisdiction. The validity of the Ontario *Labour Relations Act* is not disputed, but only its application to the employees who are the subject of these applications for certification. That challenge is raised under two heads of the *Constitution Act, 1867* ("the *Constitution Act*"): section 91(10) Navigation and Shipping and section 91(12) Sea Coast and Inland Fisheries, with particular emphasis on the latter. Mr. Nolan contends that both those heads of exclusive federal jurisdiction encompass jurisdiction over labour relations between employers and employees in the fishing industry.

A. Provincial and federal jurisdiction over labour relations

7. It is no longer in question that labour relations is a matter coming within provincial jurisdiction under the provincial power over "property and civil rights" under section 92(13) of the *Constitution Act: Toronto Electric Commissioners v. Snider, et al*, [1925] A.C. 396 (P.C.). The general rule, therefore, is that employment relations are exclusively regulated by the province; however, there is an exception to that general rule, in which case Parliament will enjoy jurisdiction. The relationship between the exclusive power in the provinces to legislate with respect to labour relations and the exceptional power in Parliament to do so, has been expressed in general terms in

several cases. For example, in the *Reference re the Saskatchewan Minimum Wage Act*, [1948] S.C.R. 248, Mr. Justice Taschereau stated at p. 257 that the question to be determined is the competence to legislate in matters "falling strictly within any of the classes specially enumerated in section 91 of the B.N.A. Act". Kellock, J. (as he then was) stated at p. 556 of the *Reference re the Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529 (the *Stevedoring* case), in which section 91(10) of the B.N.A. Act was involved, that "legislative jurisdiction vested in Parliament to make laws in relation to works and undertakings of the character excepted by s. 92(10) [from the provinces] involves jurisdiction to legislate with respect to the persons engaged in the operation of such undertakings and the manner in which and the conditions under which such operations are carried out". In *Northern Telecom Ltd. v. Communications Workers of Canada et al* (1979), 98 D.L.R. (3d) 1 (S.C.C.), Mr. Justice Dickson (as he then was) at p.13 articulated the test for determining appropriate jurisdiction in this way: the federal government will have jurisdiction if such jurisdiction is an integral part of the federal primary competence over some single federal subject, but only if federal authority over these matters is an integral element of such federal competence. Thus the regulation of wages and labour relations, "being related to an integral part of the operation of the undertaking are removed from provincial jurisdiction ... if the business is a federal one". Mr. Justice Beetz characterized the test in the following manner in *Four B Manufacturing Limited v. United Garment Workers of America and Ontario Labour Relations Board*, [1980] 1 S.C.R. 1031, at p. 1045: the exception, in which Parliament has jurisdiction over labour relations, "comprises, in the main, labour relations in undertakings, services and businesses which, having regard to the functional test of the nature of their operations and their normal activities, can be characterized as federal undertakings, services or businesses". As will be considered below, more specifically phrased tests have been applied to particular fact situations and these, too, indicate the questions which we must ask ourselves in determining whether the Board has jurisdiction to hear these applications.

8. Exclusive federal jurisdiction is established by section 91 of the *Constitution Act* which states that the legislative authority of Parliament is

to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, -

• • •

10. Navigation and Shipping.

• • •

12. Sea Coast and Inland Fisheries.

• • •

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislature of the Provinces.

There is no contention that employment relations on the fishing boats are federal as coming within the "peace, order, and good government" power. Rather, Mr. Nolan contends that Parliament's exclusive jurisdiction over navigation and shipping and over fisheries includes jurisdiction over labour relations in industries coming within those heads. He argues that there is no restriction in

the Constitution with respect to the jurisdiction of the federal government in any matter relating to those heads of power. Beginning with the premise that the fishing boats are a federal undertaking within those two heads of power, the question which the Board must address, counsel submits, is whether the employees involved are doing the work they do in connection with that undertaking. He says that in running the boats and in catching, loading and unloading the fish, the crew are doing work in connection with a federal undertaking; put simply, there would not be fishing without the work performed by the crews, and therefore the work is integral to the federal power over "Fisheries". Counsel for the union, on the other hand, argues that it is necessary to determine whether a fishing business is an integral part of the fisheries power or necessarily incidental to that power, which, he contends, is limited to the preservation and protection of the resource. He begins with the premise that employment relations fall under provincial jurisdiction and that any exception to that general principle must be justified. Mr. Nolan begins with the assertion of a federal head of power which he reads to include jurisdiction over labour relations.

9. Specific reference to the relevant provincial legislation, the Ontario *Labour Relations Act*, and the relevant federal legislation, the *Canada Labour Code*, is in order at this point. The Ontario *Labour Relations Act* is legislation of general application to employment relations in the province and it applies unless explicitly excluded from application (for example, it does not apply to domestics or firefighters as specified in section 2 of the Act). (In that regard, Mr. Godard argued that the omission of "fishing" in section 2(b) of the Ontario Act reflects the provincial legislature's understanding that persons employed in fishing fall within federal jurisdiction for the purpose of labour relations; he adduced no evidence to support that contention and we find it of no assistance with respect to the constitutional challenge.) The *Canada Labour Code*, on the other hand, because it reflects exceptions to the exclusive provincial jurisdiction over labour relations, specifically enumerates those undertakings, works or businesses to which it applies. The relevant portion of the federal statute is Part V. Section 108(1) states as follows:

This Division applies in respect of employees who are employed upon or in connection with the operation of any federal work, undertaking or business and in respect of the employers of all such employees in their relations with such employees and in respect of trade unions and employers' organizations composed of such employees or employers.

Section 2 of the Code defines a "federal work, undertaking or business" as

any work, undertaking or business that is within the legislative authority of the Parliament of Canada, including without restricting the generality of the foregoing:

(a) a work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada;

• • •

(i) a work, undertaking or business outside the exclusive authority of provincial legislatures;

The omitted portions refer to specified federal undertakings, such as banks, ships connecting a province with any other province or works declared to be for the general advantage of Canada. "Fisheries" is not specifically included by name in that list, but the list is not intended to be exhaustive. "Fisherman" is included in the definition of "dependent contractor" in section 107 of the *Canada Code*.

10. In our consideration of whether the Ontario *Labour Relations Act* applies to labour relations between these respondents and their employees, we are guided by the principle enunciated by Chief Justice Ritchie in *R. v. Robertson* (1882), 6 S.C.R. 52, in which the Supreme Court

of Canada was required to consider the validity of licences granted by the federal government to Robertson to fish a certain portion of the Miramichi River in New Brunswick, when the province had already granted licences to do the same. His Lordship stated that there was no “hard and fast” principle of construction in determining whether legislation is *intra vires*, but that the closest appropriate one is that the power of the local legislatures in property and civil rights is subject to the power of the Dominion government, but that the Dominion rights

must be exercised so far as may be consistent with the rights of the local legislatures, and therefore the Dominion Parliament would only have the right to interfere with property and civil rights in so far as such interference may be necessary for the purpose of legislating generally and effectually in relation to matters confided to the Parliament of *Canada*. (p.111)

The Chief Justice then adopted the principle set out in *The Citizen's Insurance Co. v. Parsons* (1881) 7 App. Cas. 96 that where there is an apparent conflict between the powers granted under different sections of the constitution, “the language of the two sections must be read together, and that of one interpreted, and, where necessary, modified by that of the other ... [I]t may, in most cases, be found possible to arrive at a reasonable and practical construction of the language in the sections, so as to reconcile the respective powers they contain, and give effect to all of them” (cited at p. 112). Thus it must be determined “whether language of a general nature must not by necessary implication or reasonable intendment be modified and limited” (cited at p. 113). Faced with the need in *Robertson* to reconcile the power granted the federal Parliament in fisheries and that granted the provincial legislatures under property and civil rights, the Chief Justice identified his task at p. 114 as follows:

Let us now refer to the sections of the *British North America Act* bearing on the present case, and guided by considerations such as these, I think the Act can be so read as to avoid all conflict and give to each legislative body the full legislative and proprietary rights intended to be conferred by the Imperial Parliament.

11. Keeping this general principle in mind, the task before the Board is to determine the scope of the federal power in navigation and shipping and in fisheries in order to assess whether the activities engaged in by the respondents herein, owners of fishing boats, falls within those powers; if they do so fall, labour relations between those employers and their employees must be held to be within federal jurisdiction, the *Canada Labour Code* will apply and this Board will not have jurisdiction to hear and determine these certification applications; if they do not so fall, the labour relations will be within provincial jurisdiction and the *Ontario Labour Relations Act* will apply to give the Board jurisdiction.

B. The Facts

12. In order to apply the tests articulated by the Supreme Court of Canada set out above, and to determine whether the Ontario legislation or the Canada statute applies, it is necessary that the Board have some understanding of the nature of the employer's enterprise and the work performed by the employees. In this regard, counsel placed before the Board the following agreed statement of facts which applies to all the fishing boats involved in these applications and reference to which is restricted to the constitutional issue:

2. The RESPONDENTS are Fishing Boat Owners engaged in commercial fishing on Lake Erie. These fishing activities take place wholly within the territorial boundaries of the Province of Ontario.

3. The fishing is conducted from fishing boats having crews ranging in number from five (5) to eight (8) fishermen, including the Captain. In addition, some, if not all, of the RESPONDENTS

employ one or more net makers or repairers, who work on shore, maintaining the nets and other fishing gear.

4. Each RESPONDENT requires a licence to fish which states, inter alia, the name and/or the number of the boat, and the conditions under which the licence is issued, including: the waters where the licensee is permitted to catch fish; any restrictions on the size of the nets or fish; the species of fish permitted to be caught; and the quota or quantity of fish permitted to be caught. This quota system has been in effect since 1984, before which the Licence did not regulate the quantity of the catch.

5. The Licence is issued by the Ministry of Natural Resources of Ontario, whose officers supervise the fishery along with Officers of the Ministry of Fisheries and Oceans and the Ministry of the Environment. The Licence is issued pursuant to the provisions of the Ontario Fishery Regulations promulgated pursuant to the Fisheries Act, a Federal Statute.

6. For the purposes of the determination of the jurisdictional issue before the Board only, and for no other purpose, it is agreed that the RESPONDENTS do not carry on the business of the cleaning or the processing of fish.

7. The deckhand fishermen are employees of the RESPONDENTS who make the usual statutory deductions from their pay consistent with an employer-employee relationship, including Income Tax, Unemployment Insurance, Canada Pension Plan. In addition, each of the RESPONDENTS pays Workers' Compensation premiums to the Ontario Workers Compensation Board to cover its employees.

8. The boats upon which the fishermen are employed are registered federally under the jurisdiction of the Canada Shipping Act.

9. The home ports of the Fisheries operated by the RESPONDENTS are either Wheatley or Kingsville.

Counsel clarified that the purpose of paragraph 6 was to ensure that only the fishing boat owned by Omstead Foods, the respondent in File No. 1267-86-R, was the subject of the Board's decision, since Omstead Foods is the only one of the respondents which owns both fishing boats and a processing plant. (The constitutional jurisdiction over the labour relations in such processing plants is before another panel of this Board.) In addition, during the hearing, counsel agreed to two other facts. The crew are paid on a share basis; they share in equal parts a percentage of the value of the catch, the actual percentage varying from boat to boat (in certain instances, the crew are paid an hourly rate but it was conceded by Mr. Nolan that such method of payment is the exception). All the fish caught are sold to processing plants located in the Windsor area and these plants then sell to distributors in Ontario.

C. "Navigation and Shipping"

13. We deal first with the challenge to the Board's jurisdiction under section 91(10) of the *Constitution Act*, "Navigation and Shipping". Mr. Nolan submits that the fishing boats are the employees' workplace and since they are registered under federal legislation, the *Canada Shipping Act*, they are within federal jurisdiction by virtue of section 91(10) of the *Constitution Act*. They thus constitute a "federal work, undertaking or business" subject to Part V of the *Canada Labour Code*.

14. The major case under this head is the *Stevedoring* case, *supra*, in which the applicability of the predecessor to the current *Canada Labour Code* was challenged. (We note that Mr. Nolan did not restrict his reference to this case to his argument under section 91(10) of the *Constitution Act*; we also consider it below.) The employees involved were employees of an independent contractor and their work involved loading and unloading cargo ships which operated between Canada

and foreign ports. The labour relations governing these employees and their employer was held to be under federal jurisdiction. A brief review of the view taken by the majority is useful as indicating the application of the general principles set out in paragraph 7 above. Kerwin, C. J. indicated the limits to the federal power at p. 535: "the Act before us should not be construed to apply to employees who are employed at remote stages, but only to those whose work is intimately connected with the work, undertaking or business". His Lordship concluded at p. 537 that "[t]he employees ... are part and parcel of works in relation to which the Parliament of Canada has exclusive jurisdiction to legislate". Mr. Justice Taschereau found, at p. 541, that the regulation of the employment of stevedores is an essential part of navigation and shipping and is essentially connected with the carrying on of the transportation by ship of the cargo which stevedores load. Thus, even if incidentally affecting provincial rights, the legislation was valid as being in relation to a subject within federal legislative power under section 91 of the *British North America Act*.

15. However, the majority of justices appeared to be of the opinion that, in the words of Taschereau, J., at pp. 541-542, although "[t]he terms on which these powers [in section 91(10)] are given are so wide, as to be capable of allowing the Dominion Parliament to restrict very seriously the exercise of *proprietary rights* [in the province] [emphasis in original]", "[t]his however, cannot be construed as excluding the provincial jurisdiction over certain matters as for instance inland shipping which is not always of federal concern [emphasis added]". The suggestion of a limited geographical scope of the federal power over navigation and shipping in the *Stevedoring* case, *supra*, was confirmed in *Agence Maritime Inc. v. Canada Labour Relations Board et al* (1969), 12 D.L.R. (3d) 722, a unanimous judgement of the Supreme Court of Canada. There the labour relations governing an employer owning three coastal vessels which travelled in Quebec only, with the exception of three brief trips outside the province, was held to be within provincial jurisdiction. The vessels were registered in the Port of Quebec. Fauteux, J., speaking for the Court, stated at p. 728 that

regardless of how liberally the powers conferred upon Parliament by s. 91(10) ... must be construed ... in a case of [this] type, and, except in so far as the shipping aspect of the matter is concerned, the provisions of s. 91(29) and s. 92(10)(a) and (b) are collectively intended to exclude from the jurisdiction of Parliament maritime shipping undertakings whose operations are carried on entirely within the boundaries of a single Province.

16. In the case before the Board, the fishing boats operate only in the province of Ontario; the respondents are therefore intra-provincial undertakings and the federal power over navigation and shipping does not apply to them. Accordingly, it is not necessary to consider whether fishing boats as such fall within this head of federal power and we do not do so, although we note that there is nothing before us to link federal competence over labour relations in the commercial fishing industry with the federal power over navigation and shipping. Nor, to put it another way, is there anything to suggest that commercial fishing (or the regulation of labour relations therein) is essential to navigation and shipping. (That is not to say, in accordance with Chief Justice Davey at p. 591 of *Mark Fishing Co. Ltd. et al v. United Fishermen & Allied Workers' Union et al* (1972), 24 D.L.R. (3d) 585 (B.C.C.A.), that "some aspects of employment on fishing vessels involve 'Navigation and Shipping'" such as the qualifications of captains, engineers and seamen, "special aspects of maritime employment [which] do not bear upon the broad question ... [of jurisdiction over labour relations generally]".) Similarly, registration under the *Canada Shipping Act* is not determinative of the question of jurisdiction over labour relations. It is not the location of the business, but the activity engaged in by the employer on a regular basis, which is significant: *Four B Manufacturing Limited, supra*. We refer also to *Underwater Gas Developers Ltd. v. Ontario Labour Relations Board et al* (1960), 24 D.L.R. (2d) 673 (Ont. C.A.) in which the Court of Appeal held labour relations between a company engaged in the establishment and servicing of sites for

drilling underwater gas and its employees was subject to the Ontario *Labour Relations Act*; in that case, the boats used by the company were subject to the *Canada Shipping Act*.

D. "Sea Coast and Inland Fisheries"

17. We turn now to the question of whether the power over "Sea Coast and Inland Fisheries" gives the federal Parliament jurisdiction over the labour relations between fishing boat owners and crew. (We note that the respondents take the position that on-shore workers, such as net repairers and office workers, are properly part of the bargaining unit. However, neither counsel addressed the effect of including these workers in their submissions on the constitutional issue.) It is first necessary to determine the nature or scope of this federal head of power. It is only when this question has been answered that Mr. Nolan's contention that all matters relating to that head of power fall within federal jurisdiction can be applied. If labour relations are integral to that jurisdiction (as he says they are), they will be governed by federal statute.

(1) Scope of the Fisheries Power

18. Both counsel referred us to statutes dealing with fisheries. Mr. Nolan provided us with copies of statutes or portions of statutes enacted by Parliament to indicate the scope of the exercise of federal power. Counsel for the union submitted the statutes of Newfoundland, New Brunswick and Prince Edward Island which have legislated specifically with respect to the labour relations of persons engaged in fishing. As counsel for the union pointed out, the fact of enactment is not determinative; of relevance is the entitlement to enact. Nevertheless, one or two observations with respect to these statutes might be in order. For the most part, the federal statutes clearly deal with issues relating to the protection of the fisheries, such as prohibited methods of catching fish or mammals, restricted seasons for fishing, the construction of "fishways", prohibition against placing deleterious substances in the water, the setting aside of particular waters for the propagation of fish and penalties for contravening the statute. Mr. Nolan points to section 7 of the *Fisheries Act, 1865*, which deals with the "engagement of fishermen" as relating to labour relations. At that time, however, employment law was governed by the laws of conspiracy and restraint of trade, a matter of criminal law rather than, as it subsequently became in our own federal system, a matter of property and civil rights. We note that the amended "purposes" of the *Fisheries Act* to come into force January 1, 1987, are as follows:

- (a) to provide for the conservation and protection of fish and waters frequented by fish;
- (b) to provide for the proper management, allocation and control of the seacoast fisheries of Canada;
- (c) to ensure a continuing supply of fish and, subject to paragraph (a), taking into consideration the interests of user groups and on the basis of consultation to maintain and develop the economic and social benefits from the use of fish to fishermen and others employed in the Canadian seacoast fishing industry, to others whose livelihood depends in whole or in part on seacoast fishing and to the people of Canada; and
- (d) to provide for the proper management and control of the inland fisheries of Canada and, subject to the constitutional jurisdiction of the provinces, for the allocation of those fisheries.

(It would not be expected, of course, that one of the purposes of the *Fisheries Act* would be the regulation of labour relations in the fisheries since such provision, were it to be provided at all, would be found in the *Canada Labour Code*.) With respect to the provincial legislation, it is interesting to note that the schemes are generally set up around fishermen associations and "operators" or "buyers" who are defined as persons who buy fish for the purpose of resale or processing, and not around crews and boat owners.

19. These statutes provide some indication of the federal and provincial perceptions of the legislative authority falling within the jurisdiction of each level of government. However, our determination of the scope of the fisheries power requires resort to jurisprudence relating to that issue. The scope of the fisheries power was explicitly considered in *Attorney-General for the Dominion of Canada v. Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia* [1898] A.C. 700 (P.C.) (the *Fisheries Reference*) and in *Robertson, supra*. The *Fisheries Reference* concerned the ownership of lake, river and other water beds not granted to the Dominion before confederation and the right of Parliament to issue licences to fish in such waters. The Judicial Committee of the Privy Council held that there is a distinction between proprietary rights and legislative jurisdiction; legislative jurisdiction does not carry with it ownership rights. Proprietary rights in fisheries and in relation to fisheries is provincial, but may be affected by Dominion legislation. For example, the "extent, character, and scope" of legislation with regard to the times of year when fishing is allowed or the instruments which may be used are "left entirely" to Parliament and the manner of fishing is "undoubtedly" within Dominion competence (at pp. 432-433). However, the conveyance of a private fishery falls within property and civil rights and legislation relating to that "deals directly with property, its disposal, and the rights to be enjoyed in respect of it, and was not in their Lordships' opinion intended to be within the scope of the class 'Fisheries' as that word is used in s. 92" (at p. 434). In *Robertson, supra*, the Chief Justice, beginning at p. 120, states more broadly that

the legislation in regard to "inland and Sea Fisheries" contemplated by the *British North America Act* was not in reference to "property and civil rights" -- that is to say, not as to the ownership of the beds of the rivers, or of the fisheries, or the rights of the individuals therein, but to subjects affecting the fisheries generally, tending to their regulation, protection and preservation, matters of a national and general concern and important to the public, such as the forbidding fish to be taken at improper seasons in an improper manner, or with destructive instruments, laws with reference to the improvement and increase of the fisheries; in other words, all such general laws as ensure as well to the benefit of the owners of the fisheries as to the public at large, who are interested in the fisheries as a source of national or provincial wealth; ... I cannot discover the slightest trace of an intention on the part of the Imperial Parliament to convey to the Dominion Government any property in the beds of streams or in the fisheries incident to the ownership thereof ... or to confer on the Dominion Parliament the right to appropriate or dispose of them, and receive therefor large rentals which most unequivocally proceed from property, or from the incidents of property in or to which the Dominion has no shadow of a claim; ... [emphasis added]

To all general laws passed by the Dominion of *Canada* regulating "sea coast and inland fisheries" all must submit, but such laws must not conflict or compete with the legislative power of the local legislatures over property and civil rights beyond what may be necessary for legislating generally and effectually for the regulation, protection and preservation of the fisheries in the interests of the public at large ... [T]he general jurisdiction over the fisheries is secured to the parliament of the Dominion, whereby they are enable to pass all laws necessary for their preservation and protection, this being the only matter of general public interest in which the whole Dominion is interested in connection with river fisheries in fresh water, nontidal rivers or streams, such as that now being considered, while at the same time exclusive jurisdiction over property and civil rights in such fisheries is reserved to the provincial legislatures, thus satisfactorily, to my mind, reconciling the powers of both legislatures without infringing on either.

Strong, J. also stated at p. 135 that section 91(12) may be considered "as authorizing Parliament to pass laws for the regulation and conservation of all fisheries, inland as well as sea coast, by enacting, for instance, that fish shall not be taken during particular seasons ... preventing undue destruction of fish by taking them in a particular manner or with forbidden engines, and in many other ways providing for what may be called the police of the fisheries". Henry, J. was of the view that the section 91(12) power "is but to regulate the fisheries and to sustain and protect them by grants of money and otherwise as might be considered expedient" (at p. 142). We note that Henry, J.

does refer to other enumerated federal powers, such as “shipping and navigation”, “ferries” and so forth, and indicates that the federal power to legislate on such matters does not mean that the right of property was passed to the Dominion in such matters. We also recognize that the federal government may have jurisdiction over labour relations under those heads. Thus the fact that property itself is not transferred to the Parliament does not necessarily mean that labour relations will not fall under federal jurisdiction.

20. However, in our view, while both the *Fisheries Reference*, *supra*, and *Robertson*, *supra*, were concerned with property in the narrow sense, with proprietary rights, we cannot accede to Mr. Nolan’s interpretation that those cases stand for the proposition that only proprietary rights are excluded from the fisheries power. The statements cited above indicate clearly that the justices in *Robertson*, *supra*, in particular, were addressing themselves not only to the limited question of whether proprietary rights in river beds were transferred to the Dominion by virtue of the grant to the Parliament of the fisheries power, but also to the broader question of the scope of the fisheries power. While the issues listed by the justices are not said to be exhaustive, the type of subjects listed are consistently related to the preservation and protection of fish as a natural resource and the need for the federal government to regulate the fisheries for those ends. The justices base their decision in the provincial jurisdiction over property and civil rights which at that time had not been held to encompass labour relations. Even so, the Chief Justice excludes the “rights of individuals” in the fisheries from the scope of the federal head of power.

21. More recent case law also supports the view that the fisheries power is limited to that necessary or incidental to the preservation of fish as a natural resource. It is of interest that fish canneries have been held by the Supreme Court of Canada and by the Privy Council to come within provincial jurisdiction: *Re Fisheries Act*, 1914, [1928] 4 D.L.R. 190 (S.C.C.), *aff’d* [1930] 1 D.L.R. 194 (P.C.). In the Supreme Court, Newcombe, J., speaking for all justices on this point, stated at p. 200:

undoubtedly Parliament has the exclusive authority to regulate what falls within the description [of sea coast and inland fisheries] and one sort of regulation might be a licensing requirement. But a fish cannery is not, according to any of the definitions, or in practice, embraced within a fishery ... It is for the preservation and marketing of the fish when caught and landed that the cannery fulfills a commercial purpose.

The right to operate a fish cannery is a matter of civil rights within the province, similar to the right to operate a fruit cannery or vegetable cannery. Newcombe, J. went on to say that a cannery does not fall within the definitions of a “fishery” which he cited at p. 201: “the right of catching fish in the sea, or in a particular stream or water”, taken from Paterson on Fishery Laws (“the Paterson definition”), and “[t]he business, occupation, or industry of catching fish”, from Murray’s New English Dictionary (“the Murray definition”). Mr. Nolan provided the Board with several definitions of “fishery” which refer to the “business of fishing” or the “catching of fish” or similar terms. These definitions must be interpreted in light of the following further comment by Newcombe, J. at p. 201:

Neither the business of canning fish, nor the operation of fish canning factory, is, by either [of the Paterson or Murray] definitions, nor by any other which I have found, comprised in “fisheries”, as that word is used in s. 91, or the terms of Union with British Columbia. Section 7A [of the *Fisheries Act*, requiring a person to obtain a federal licence to operate a cannery] has no limited or special application to British Columbia, nor to any one of the Provinces as distinguished from another, and it should therefore receive a general and uniform interpretation. The colony was admitted into the Union on the terms and conditions expressed, subject to the provisions of the B.N.A. Act, 1867, and the stipulation with regard to the fisheries which is embodied in the terms of Union consists merely in an undertaking on the part of the Dominion to “assume and defray the charges for the ... protection and encouragement of fisheries,” a provision which I

am disposed to think does not extend the legislative powers of the Dominion to the licensing of fish canneries.

22. In *Mark Fishing, supra*, Chief Justice Davey stated at p.592 that the focus of the Paterson definition "is the natural resource, and the right to exploit it, and the place where the resource is found, and the right is exercised [sic]" and nothing in it suggests that section 91(12) "is directed to the regulation or control of the rights and obligations as between themselves of employers and employees who engage in the business of exploiting the resource". Recognizing that the Murray definition is more supportive of the inclusion of labour relations in the fisheries power, his Lordship nevertheless concludes that the weight of authority supports the opposite position that labour relations are not included. Martland, J., in *Fowler v. The Queen* (1980), 113 D.L.R. (3d) 513 (S.C.C.) and *Northwest Falling Contractors Ltd. v. The Queen* (1980), 113 D.L.R. (3d) 1 (S.C.C.), cited Chief Justice Davey's interpretation of the Paterson definition, apparently with approval (but did not refer to the Chief Justice's understanding of the Murray definition).

23. The Privy Council made it clear at p.199 of the *Fisheries Act* case (P.C.), *supra*, that canneries are far outside any permissible content of the fisheries power: "trade processes by which fish when caught are converted into a commodity suitable to be placed upon the market cannot upon any reasonable principle of construction be brought within the scope of the subject expressed by the words 'Sea Coast and Inland Fisheries' ". The contention that licensing of canneries is incidental to the fisheries power was firmly rejected by their Lordships:

It may be, though on this point their Lordships express no opinion, that effective fishery legislation requires that the Minister should have power for the purpose of enforcing regulations against the taking of unfit fish or against the taking of fish out of season, to inspect all fish canning or fish curing establishments and require them to make appropriate statistical returns. Even if this were so the necessity for applying to such establishments any such licensing system as is embodied in the sections in question does not follow. It is not obvious that any licensing system is necessarily incidental to effective fishery legislation, and no material has been placed before the Supreme Court or their Lordships' Board establishing the necessary connection between the two subject matters.

24. The employers herein are involved in the catching of fish, not in canning. Nevertheless, in our view, the *Fisheries Act* cases, *supra*, indicate that the fishery power is to be contained, and read in conjunction with the *Fisheries Reference, supra*, and *Robertson, supra*, indicate that it is to be read within the context of preservation and protection of fish as a natural resource in the public interest, which is national in scope. Support for this view can be found in *Fowler, supra*. In that case, the Supreme Court held that section 33(3) of the *Fisheries Act*, prohibiting any person engaged in logging and certain other similar operations from putting debris into "any water frequented by fish", was *ultra vires* the Parliament of Canada as being too broad. In doing so, it reversed the decision of the British Columbia Court of Appeal: (1978), 93 D.L.R. (3d) 724. Martland, J., for the Supreme Court, cited with approval passages from *Robertson, supra*, and the *Fisheries Reference, supra*, which limit the federal power to preservation of the fisheries or prescribing the time of year when fishing is to be allowed (in the context in those cases of determining whether proprietary rights are encompassed by the fisheries power). His Lordship then went on at p.519 to cite with approval a passage in the dissent of Chief Justice Laskin in *Interprovincial Co-Operatives Ltd. et al v. The Queen* (1975), 53 D.L.R. (3d) 321, a passage "not the subject of disagreement by the majority":

"It is, in my view, untenable to fasten on words in a judgment, such as the words 'tending to their regulation, protection and preservation', which appear in the reasons in *The Queen v. Robertson*, and read them as if they have literal constitutional significance. Federal power in relation to fisheries does not reach the protection of provincial or private property rights in fisheries through actions for damages or ancillary relief for injury to those rights. Rather, it is con-

cerned with the protection and preservation of fisheries as a public resource, concerned to monitor or regulate undue or injurious exploitation, regardless of who the owner may be, and even in suppression of an owner's right of utilization."

Martland, J. found that section 33(3) of the *Fisheries Act* "does not deal directly with fisheries, as such, within the meaning of [the Paterson or Murray] definitions". Because it "seeks to control certain kinds of operations not strictly on the basis that they have deleterious effects on fish, but rather, on the basis that they might have such effects", it is legislation in relation to property and civil rights within a province. Since it makes no attempt to show that the proscribed conduct will lead to any likely harm to fisheries, it cannot be supported as necessarily incidental to the federal power. Furthermore, although in *Northwest Falling*, *supra*, (decided shortly after *Fowler*), the Supreme Court upheld section 33(2) of the *Fisheries Act*, Martland, J. stated at p.5 of that case that previous Supreme Court judgments and those in the Privy Council "have construed 'fisheries' as meaning something in the nature of a resource" (and thus is not restricted only to fish in the narrow sense, but can extend to all creatures which constitute the fisheries resource). His Lordship distinguished *Fowler* on the basis that section 33(3) of the *Fisheries Act* "is not restricted by its own terms to activities that are harmful to fish or fish habitat" while section 33(2) is.

25. Lower court decisions also support the view that the fisheries power is limited to regulation, preservation and protection of the fisheries and that the legislative power of Parliament must be directly related to the fisheries as so defined. In *Gulf Trollers Association v. Minister of Fisheries and Oceans and Shinnars*, [1984] 6 W.W.R., Collier, J. of the Federal Court Trial Division, in finding federal regulations which limited commercial fishing of chinook salmon, but not sport fishing, to be *ultra vires* Parliament, stated at p. 228:

Conservation and rehabilitation of stocks, to my mind, fall within "protection and preservation" of the public resource. Management and control, if necessarily incidental to protection and preservation, also fall within federal legislative power.

I do not, therefore, accept the contention on behalf of the respondents that there is power, federally, to manage and control fisheries for the benefit of Canadians, quite distinct from any protection or preservation considerations.

Since one reason for the regulations was "socio-economic management allocations", they could not be sustained. A similar view was taken by Mr. Justice Berger in *Attorney-General of Canada v. Aluminum Co. of Canada Ltd.* (1980), 115 D.L.R. (3d) 495 (B.C.S.C.), although in that case he issued a mandatory injunction requiring Alcan to release certain amounts of water through its spillway in compliance with an order of the Minister of Fisheries and Oceans pursuant to the impugned legislative provision which empowered the Minister to require the release of an amount of water through spillways sufficient to flood spawning grounds. In *obiter*, Berger, J., referring to *Robertson*, *supra*, *Fowler*, *supra*, and *Northwest Falling Contractors*, *supra*, noted at p. 497 that "[t]he Minister's power is wide, but it is a power conferred for the protection of the fishery, and not one which purports to allow him to regulate other activities unconnected with the fishery".

26. We are satisfied on the basis of the authorities cited above, that while the federal power under section 91(12) of the *Constitution Act* has not been finally determined or definitely delineated, it has been generally and consistently considered to extend only to the preservation of fisheries as a natural resource. The completely open-ended nature of the term "Sea Coast and Inland Fisheries" has of necessity invited judicial interpretation; that interpretation has been consistent with the rationale that as a public resource for the benefit of all persons in Canada, Parliament requires the power to control fisheries in order to conserve and improve the fisheries. The next question is whether control over the labour relations of fishing boat crews falls within or is integral to that mandate.

(2) Relationship of the Work Performed and the Federal Power

27. The specific issue before this Board of whether labour relations on fishing boats falls within the scope of section 91(12) of the *Constitution Act* has not yet been determined by the Supreme Court of Canada. The matter was addressed in *Mark Fishing, supra*; there the Chief Justice of the British Columbia Court of Appeal found that labour relations on fishing boats is under provincial jurisdiction. In his Lordship's view, the regulation of employment relations cannot advance the protection and regulation of fish. Referring to *Robertson, supra*, his Lordship saw no distinction between property rights in fisheries and regulation of labour relations, since both fall within section 92(13) of the B.N.A. Act. However, Maclean, J. did not decide that question and Robertson, J. found that if the relationship between the boat owners and the fishing crew was one between employer and employees (rather than of co-adventurers), the federal act would apply (although he explicitly stated that the federal statute does not apply to the shore workers). Since the Supreme Court found that the union had no defence against liability for counselling the employees in the processing plants and the crews of the boats to "strike" the boat owners, regardless of whether the crew were employees and regardless of whether the federal legislation applied, it did not address the issue of where jurisdiction over labour relations lay: 38 D.L.R. (3d) 316 (S.C.C.). *Mark Fishing, supra*, therefore, cannot be understood to stand for the proposition that labour relations on fishing boats are within provincial jurisdiction.

28. Of interest is the decision of the Federal Court of Appeal in *Re British Columbia Packers Ltd. et al and British Columbia Council United Fishermen and Allied Workers Union* (1975) 71 D.L.R. (3d) 565, aff'g (1974), 50 D.L.R. (3d) 602 (F.C.T.D.) which held that labour relations between the owners of processing plants and the crews of fishing vessels fall within provincial jurisdiction. The Supreme Court of Canada did not address the constitutional question because it determined the case on the basis that, because of the specific wording of the *Canada Labour Code*, the crews were not employees of the fish processors and therefore relations between the two could not be governed by the Code regardless of whether it was constitutionally applicable: (1977), 82 D.L.R. (3d) 182 (S.C.C.). The facts of the *B.C. Packers* case are slightly different from those in the case before the Board, although that distinction raises an interesting question about the relationship between the activity engaged in by fishing boat crews and that of the processing plants. In that case, the applicant union had applied to the Canada Labour Board for certification as bargaining agent of the crews of the fishing boats who sell fish to the processors. In other words, the crews of the fishing boats were considered by the union to be employees of the processors, not employees of the fishing boat owners; the latter relationship is, of course, the one presently before the Board. As already indicated, the appropriate jurisdiction of employees of the canning plants themselves (that is, persons who work within the canning plants) has been determined to be provincial: *Fisheries Act, supra*. The question in *B. C. Packers, supra*, as articulated by Chief Justice Jackett at p. 570 of the Federal Court of Appeal decision, was whether the *Canada Labour Code* extends to "regulating the sale of fish or as a law regulating that part of the business of fishing or of a 'fisheries' business that constitutes disposal of the fish after they have been caught". However, his Lordship went on to frame the issue more broadly in the following passage beginning at p. 571:

In so far as prior decisions are concerned, s.91(12) has not been found to go beyond what may be described conveniently, but not precisely, as police regulation of "fisheries" regarded as property rights, the activity of removing fish from the water of the places where that activity is carried on. Clearly, so regarded, s. 91(12) is not broad enough to authorize a law in relation to the sale of fish after it has been caught ... The difficult question raised by this case is whether the word "fisheries" in s. 91(12) also embraces a fishing or "fisheries" business as such, in which event, a law regulating the business could regulate the whole of the management of the business, which would include labour relations between the operator of the business and his employees and the disposition of the fish after it is taken from the water...

[I]t would seem to me that the regulation of businesses *as such* has been carved out of s. 91(12) by decisions that are binding on this Court and has been left to the provincial Legislatures as being the regulation of matters of a merely local or private nature in the respective Provinces except where the regulation of a particular class of business falls within a specific portion of s. 91

....

Most other heads of federal power, as it seems to me, relate to subject matters other than the regulation of businesses as such - although a particular law of some other character, such as a criminal law, may substantially affect the operation of businesses With some hesitation, therefore, because I am only too aware that there are *dicta* in the decisions, and there are portions of the definition of 'federal work, undertaking or business' in the *Canada Labour Code* that do not seem to accord with my reasoning, I have concluded that s.91(12) authorizes Parliament to make laws in relation to "fisheries" but does not extend beyond that to the making of laws in relation to things reasonably incidental to carrying on a fishing business, such as labour relations and disposition of the products of the business, when such things do not *in themselves* fall within the concept of "fisheries". [emphasis in original]

Sheppard, D.J. also held at p. 572 that section 91(12) "does not extend to the regulating of the business of fishing as such" and Smith, D.J. agreed that section 91(12) "is not broad enough to authorize Parliament to enact legislation in relation to the business of fishing, insofar as that business is concerned with labour relations or with the sale of fish after they have been caught". We are cognizant, as Mr. Nolan reminded us, that the *B. C. Packers* cases, *supra*, and *Mark Fishing*, *supra*, were decided before *Montcalm Construction Inc. v. Minimum Wage Commission et al* (1978), 93 D.L.R. (3d) 641(S.C.C.) and *Northern Telecom*, *supra*, in which the Supreme Court articulated the tests on which Mr. Nolan relied; however, in our view, the approach taken by the Courts in the *B. C. Packers* cases, *supra*, and *Mark Fishing*, *supra*, are not inconsistent with those tests which do, in any case, evolve from prior jurisprudence. Our own decision is based on the tests generally articulated by the Supreme Court of Canada, as set out in paragraph 7 above and paragraph 29 below.

29. In reaching our decision on this point, we have been guided by the principles expressed in the *Reference re the Saskatchewan Minimum Wage Act*, *supra*; the *Stevedoring* case, *supra*; *Commission du Salaire Minimum v. The Bell Telephone Company*, [1966] S.C.R. 767; *Letter Carriers' Union of Canada v. Union of Postal Workers et al* (1973), 40 D.L.R. (3d) 105 (S.C.C.) (the *Letter Carriers* case; *Canada Labour Relations Board et al v. City of Yellowknife* (1977), 76 D.L.R. (3d) 85 (S.C.C.); *Montcalm Construction*, *supra*, and *Northern Telecom*, *supra*. In certain of those cases, the Supreme Court was asked to decide if one entity performing work for another entity within federal jurisdiction, was nevertheless subject to federal jurisdiction even though it was separate from the federal entity: whether stevedores working for an independent contractor loading and unloading ships were subject to federal jurisdiction by virtue of the federal "Navigation and Shipping" power (*Stevedoring* case); whether the employees of a mail delivery contractor delivering mail for the Canada Post Office were subject to federal jurisdiction by virtue of the federal power over the "Postal Service" (the *Letter Carriers* case); whether the employees of a contractor constructing runways at Mirabel airport were subject to federal jurisdiction by virtue of the power over aeronautics (*Montcalm Construction*); and whether installers of telephone equipment for Bell Canada were within federal jurisdiction by virtue of the federal power over communications (*Northern Telecom*). The Court was also asked to decide whether a temporary employee hired by a postmistress could benefit from the Saskatchewan Minimum Wage Law (*Reference re Saskatchewan Minimum Wage Act*); whether an interprovincial telephone system is subject to Quebec minimum wage laws (*Commission du Salaire Minimum*); and whether employees of a municipality organized in federally administered territory are governed by the *Canada Labour Code* (*City of Yellowknife*). In all but two of these cases, the Supreme Court held that federal legislation applied (or that provincial legislation did not apply). In *Montcalm Construction*, *supra*, it held that provincial legislation intended to recover wages, health insurance premiums and similar employee

entitlements applied. In *Northern Telecom*, *supra*, the Court ruled that it had insufficient evidence before it to reach a decision but the majority subsequently found employees in a different region and their employer to be governed by federal statute: *Northern Telecom Canada Ltd. et al v. Communication Workers of Canada et al* (1983), 147 D.L.R. (3d) 1 (S.C.C.). Dickson, J. (as he then was) stated: "There is clearly some connection between the Telecom installers and Bell Canada, the core federal undertaking, but is it sufficient to displace the *prima facie* position that labour relations are a matter of provincial competence?" Although he considered the case "close to the boundary line", his Lordship found that the installers' work was "an integral part of Bell Canada's operations as a going [and continually renewed, updated and expanded] concern".

30. The thrust of these cases is that federal jurisdiction over labour relations will apply when the work performed is closely related to the federal entity involved. Kerwin, C.J. at p. 535 of the *Stevedoring* case, *supra*, stated that the federal legislation should not apply to employees "employed at remote stages, but only to those whose work is intimately connected with the work, undertaking or business"; Kellock, J. in the same case stated at p. 556 that "in connection with" in now section 108 of the *Canada Labour Code* is "to be construed as limited to persons actually engaged in the operation of the work, undertaking or business in question"; Estey, J., also in the same case, phrased the test as follows at p. 561: is labour relations an "integral part of or necessarily incidental to" the section 91 heading involved (and applied that test to determine whether the work done by the stevedores was an integral part of the operations of the steamships). In the *Letter Carriers* case, *supra*, the Court found that the work performed by the truck drivers was "essential to the function of the Postal Service" and indicated that it was not necessary that they work exclusively for the Post Office. Remoteness was again referred to in *Northern Telecom* (1979), *supra*, at p. 15: "Mere involvement of the employees in the federal work or undertaking does not automatically import federal jurisdiction. Certainly, as one moves away from direct involvement in the operation of the work or undertaking at the core, the demand for greater interdependence becomes more critical". An important factor in the *Reference re Saskatchewan Minimum Wage Act*, *supra*, was that the federal power under the "Postal Service" is considered to be of "widest import" and is intended to be interpreted "as sufficiently comprehensive to include all the accommodations and facilities provided by the Post Office" (at p. 269, per Estey, J.). Accordingly, since the employee involved did usual post office work, the provincial minimum wage legislation did not apply: "It cannot be said that the imposition of minimum wages and maximum hours relative to employees in the Post Office does not attempt to interfere directly with the exercise of Dominion power in respect to the Postal Service" (at p. 272, per Estey, J.). In *Commission du Salaire Minimum*, *supra*, labour relations, as a "vital part of the management and operation" of such an undertaking, was found to fall within federal jurisdiction Bell Telephone, an interprovincial undertaking under sections 91(10) and 92(29) of the B.N.A. Act. The *City of Yellowknife* case, *supra*, is of little assistance except to note the comment of Pigeon, J. at p. 90, concurred in by two other justices, that there is no reason to assume that the scope of section 2(i) of the *Canada Labour Code* was to be restricted by the authority of the Commissioner of the Northwest Territories as "it is necessarily restricted by consideration of the extent of the Provinces' legislative authority".

31. The *Montcalm Construction* case, *supra*, is of particular interest because of the analysis of the scope of "aeronautics" and "construction" engaged in by Mr. Justice Beetz (and concurred in by four other justices). In that case, Montcalm Construction had contracted to construct runways at Mirabel. There was no evidence before the Court indicating the nature of the construction done by Montcalm other than the runways and the Court therefore assumed it performed normal construction work and further found that Montcalm itself was not a federal undertaking. The Quebec Minimum Wage Commission brought an action against the contractor to recover the employees' wages, health insurance premiums and other monies owing. Montcalm argued that since aeronautics is within exclusive federal jurisdiction and Mirabel, as an airport, is part of a federal work

or undertaking, the Quebec Commission had no jurisdiction. The majority of the Supreme Court rejected that argument on the basis of the tests in the *Stevedoring* case, *supra*; *Agence Maritime*, *supra*; and the *Letter Carriers* case, *supra*. Mr. Justice Beetz, for the majority, found that the construction of an airport is not in every respect an integral part of aeronautics. Whether and where to build an airport, his Lordship said, are decisions within exclusive federal jurisdiction, as are the design, the dimensions, the materials and runways “apart from contract”. These decisions are permanently reflected in the finished product and therefore have a direct effect on the operation of the airport. But carrying out those decisions is a different matter; that, as is the requirement to wear a safety helmet, is a matter of safety. His Lordship held at p. 655 that the matter of wages paid by an independent contractor (although the status of the contractor is not determinative) to employees engaged in the construction of runways is so far removed from aerial navigation or the operation of an airport “that it cannot be said that the power to regulate this matter forms an integral part of the primary federal competence over aeronautics or is related to the operation of a federal work, undertaking, service or business”. His Lordship continued at p. 656:

... the impugned legislation does not purport to regulate the structure of runways. The application of its provisions to Montcalm and its employees has no effect on the structural design of the runways; it does not prevent the runways from being properly constructed in accordance with federal specifications; nor has it even been shown, assuming it could be, that the “physical condition” of the runways, as opposed to their structure, is affected by the wage and conditions of employment of the workers who build them.

The principles set out in *Montcalm Construction*, *supra*, were applied in *Re Attorney-General of Nova Scotia and Maritime Engineering Ltd. et al* (1979), 105 D.L.R. (3d) 158, in which the Nova Scotia Court of Appeal held that labour relations between an employer with a contract with the Department of Public Works to construct a wharf and the employees constructing the wharf were within provincial jurisdiction, even though the employer’s only business was in constructing such wharves.

32. We now apply the tests articulated by the Supreme Court of Canada in determining whether provincial or federal legislation governs for labour relations purposes when there is a federal head of power involved to the facts of the case before us. We have already said that the weight of authority supports the limitation of the federal power to the preservation and conservation of fisheries as a public resource. The respondents are fishing boat owners who engage in commercial fishing. In our view, a commercial fishing business is not a federal work, undertaking or business and therefore labour relations between the boat owners and the crews is, on that basis, not subject to the *Canada Labour Code*. However, this does not end the inquiry. For if the activities of commercial fishing are necessarily incidental or integral to the federal power over fisheries, labour relations in the commercial fishing industry will be governed by the *Canada Labour Code*. In catching fish to sell to processing plants for the market, on the evidence before us, they are not directly engaged in the preservation and conservation of the resource; where what they do has an impact or potential impact on the resource, they are subject to federal statutes and regulations relating, for example, to the kinds of fish they can catch, when and how much and with what instruments. But their activity is not directed towards the preservation of the resource; they are not “actually engaged in” the preservation of the resource. The work done by the fishermen has not been shown to be “an integral part” of or “essential to” the conserving, preserving or improving of the resource; nor does labour relations between the crew and the boat owners appear to us to be an “integral part of or necessarily incidental to” the preservation of the resource. The *Ontario Labour Relations Act* does not purport to affect the preservation and conservation of fisheries and its application to the employment relations between the owners and the crew does not affect the federal government’s ability to fulfil its mandate with respect to protecting fisheries as a resource. In short, there is no evidence before this Board to show that the regulation of employment of fishing crews

is an essential part of fisheries and is essentially connected with the preservation and conservation of the public resource. We might add that there is at least as much evidence before us of the interconnectedness of the processing plants and the boats as of the connection between the boats and the preservation of the fisheries.

33. By way of contrast, we refer to the decision of the Canada Labour Board in *Winsor v. Scotian Shelf Traders* (1984), 4 CLRBR (NS) 278 in which the Board was required to inquire into an allegation of an unfair labour practice. The employer had a contract with the Department of Fisheries to hire and supervise fisheries monitors serving on vessels in Canadian waters, as well as a second contract relating to an observer programme. The employer argued that the Canada Board had no jurisdiction because the observers were engaged in a fisheries operation which was subject to provincial jurisdiction; the applicant argued that the observers were not engaged in a fisheries operation but were performing work integral to the regulation of the fisheries and therefore within federal jurisdiction. The Board held, after referring to *Robertson, supra*, and indicating that the exact scope of the fisheries power had not been finally determined, that the observers were engaged directly in the regulation, protection and preservation of the fisheries and that therefore the regulation by Parliament of employer-employees relations between Scotian Shelf Traders and the observers is integral to Parliament's jurisdiction to regulate, protect and preserve the fisheries. In that case, the employee involved could be characterized as doing work directly within the scope of the federal power over fisheries; fishing crews are not doing work directly within the scope of that power.

III. Conclusion

34. Having considered the agreed statement of facts and the very helpful submissions of counsel both for the applicant and for the respondents, we are not satisfied that the totally intra-provincial activity engaged in by the respondents hereto and the work performed by their employees is vital or essential to, or forms an integral part of, the power of Parliament to regulate, preserve, conserve and improve fisheries so that the exclusive jurisdiction of the provincial government over labour relations is displaced by the federal jurisdiction over either "Navigation and Shipping" or "Sea Coast and Inland Fisheries".

35. We accordingly find that this Board has jurisdiction to hear these applications for certification. Hearings have been scheduled for the purpose of hearing evidence and submissions with respect to other objections raised by the respondents herein to the holding of a pre-hearing representation vote and with respect to the objections arising out of the conduct of those votes, in the event that the Board found that it had jurisdiction to hear these matters.

36. The Board ordered the ballot boxes in these applications to be sealed, pending further order of the Board. The jurisdictional issues having now been determined, the Board orders that the boxes be opened and the ballots counted in all the applications herein, except in File No. 1278-86-R. In File No. 1278-86-R, the entitlement of the applicant to a pre-hearing representation vote depends on the resolution of objections raised by the parties and accordingly, the box is to remain sealed until the issue of entitlement is resolved. The Board appoints an officer to meet with the parties with respect to the counting of the ballots, in accordance with the normal practice of the Board. The Board's order to count the ballots is subject to submissions by the parties that the boxes should not be opened. Any such submissions are to be filed with the Board within ten days of the release of this decision.

37. This matter is referred to the Registrar.

2059-85-U United Food and Commercial Workers International Union, A.F.L.-C.I.O. - C.L.C., Complainant, v. Jacmorr Manufacturing Limited, Respondent

Discharge for Union Activity - Remedies - Unfair Labour Practice - Pattern of anti-union conduct aimed at union supporters - Unfair labour practice complaints settled but complainant harassed and discharged a second time - Breach of ss.64, 66 and two settlements which included a no reprisal clause - Remedies including reinstatement with full wages, posting, and order that employer provide copy of decision to all employees

BEFORE: *R. O. MacDowell*, Vice-Chairman, and Board Members *I. M. Stamp* and *P. O'Keeffe*.

APPEARANCES: *Bernard Fishbein* and *John Slaney* for the complainant; *Steven J. McCormack* and *Jack Fler* for the respondent.

DECISION OF THE BOARD; November 28, 1986

1. This is a complaint under section 89 of the *Labour Relations Act*. The union contends that the grievor, Connie Campbell was dealt with by the respondent employer, contrary to sections 3, 64, 66, 79(1) and 89(7) of the *Act*. Ms. Campbell's employment was first terminated on October 9, 1985. She was discharged again on November 13, 1985. This case concerns that second discharge. The union contends that it was part of a pattern of anti-union conduct directed at Ms. Campbell and other union supporters. The union makes the same allegation with respect to the discharge of Steven Cliche in December 1985.

The Legal Framework

2. Before reviewing the circumstances leading up to the grievor's second discharge it may be useful to briefly set out the legal framework within which the parties' rights must be determined. The provisions of the statute upon which the grievors rely are as follows:

3. Every person is free to join a trade union of his own choice and to participate in its lawful activities.

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to com-

pel an employee to become or refrain from becoming or to continue to be or to cease to be a member or office or representative of a trade union or to cease to exercise any other rights under this Act.

89.-(7) Where the matter complaint of has been settled, whether through the endeavours of the labour relations officer or otherwise, and the terms of the settlement have been put in writing and signed by the parties or their representatives, the settlement is binding upon the parties, the trade union, council of trade unions, employer, employers' organization, person or employee who have agreed to the settlement and shall be complied with according to its terms, and a complaint that the trade union, council of trade unions, employer, employers' organization, person or employee who has agreed to the settlement has not complied with the terms of the settlement shall be deemed to be a complaint under subsection (1).

Since section 79(1) was not pressed in argument, we see no need to reproduce it here.

3. Sections 64 and 66 appear in that portion of the Act dealing with "unfair labour practices". Their purpose is fairly obvious. Freedom of association, and the principle of free collective bargaining, are concepts fundamental to our system of labour relations. Indeed, the preamble to the Act provides that "it is in the public interest of the Province of Ontario to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining...". Section 3 is a further declaration of employee rights, and is now buttressed by the Constitutional protection for "freedom of association" found in the Canadian Charter of Rights and Freedoms. However these rights would be rather hollow without effective remedies for their infringement. That is the role of the unfair labour practice sections of the Act, for it is an unfortunate reality that, although these employee rights have been entrenched in Ontario law for more than forty years, there are still some employers who are prepared to use their superior economic power to threaten or punish employees who choose to join a trade union or press for the establishment a collective bargaining relationship. The unfair labour practice sections provide a remedy and a deterrent. How effective a remedy or great a deterrent remains a matter of continuing debate.

4. In applying sections 64 and 66 to an employee discharge, the Board must determine whether the reasons given for the discharge are the only reasons, and whether they are tainted, in any way, by anti-union animus. The improper motive need not be the only or even the dominant one. It is sufficient if it was in the mind of the employer, and one of the grounds for the action taken. (See *R. v. Bushnell Communications Ltd. et al* (1973) 1 O.R. (2d) 442 (H.C.J.), affirmed 4 O.R. (2d) 288 (C.A.); *Re. JML Shirts Ltd. and Industrial Relations Board* 78 CLLC ¶14,122 (NBQB), affirmed 18 N.B.R. (2d) 695 (S.C. Appeal Division); *Westinghouse Canada Ltd.* [1980] OLRB Reports April 577, affirmed by the Ontario Divisional Court, 80 CLLC ¶14,062.) Moreover, since in our experience, employers seldom confess to an anti-union animus, the question of motive becomes the key issue in the case, and the Board must generally rely upon circumstantial evidence and draw inferences about the employer's motivation from all of the surrounding circumstances, not just the articulated reason for the discharge. In *DeVilbiss (Canada) Ltd.* [1975] OLRB Rep. September 678, the Board listed some of the factors which might be helpful in determining whether a discharge was for trade union activity:

In this case the following factors are relevant in our determination of whether there was any anti-union motive for the discharge: 1) the existence of a pattern of anti-union activity; 2) the extent of the respondent's knowledge of the existence of union activity and of the employee's involvement in that activity; 3) the manner in which the employee was discharged; 4) the credibility of the witnesses.

[1] The existence of a pattern of anti-union activity occurring at or around the time of discharge is circumstantial evidence that will support an inference that the discharge was part of that pattern. If an employer exhibits an anti-union motive in the conduct of its affairs during a certain

period, then all of its actions during that period become suspect. On the other hand, if the discharge is an isolated incident occurring in the context of legitimate behaviour, it is more difficult to conclude that there existed an improper motive for the discharge.

[2] Knowledge by the employer of union activity and the employee's involvement in that activity is an important ingredient in determining the motive for a discharge. If an employer has no knowledge of union activity among its employees, which might occur in the early stages of an organizing drive, then the possibility of an anti-union motive would be remote. Conversely, if there is knowledge, and that knowledge manifests itself in an anti-union attitude, then there would be evidence upon which the Board could base an inference that the discharge was prompted by an anti-union animus. The inference would become even stronger if the discharged employee is extensively involved in union activity and this involvement is known by the employer.

[3] The manner in which an employee is discharged may offer some clue as to the motive for the discharge. This does not mean that the Board determines whether the discharge is for just cause. Just as the existence of just cause does not offer a defence to employers, the lack of just cause does not establish a case for the employee. The issue is, in these cases, quite a different one - whether there exists any anti-union motive for the discharge. Anti-union motive, however, may be inferred from the manner in which an employee is discharged. If the manner in which the discharge occurs deviates from the normal pattern for such activity, then it is a possible inference that the deviation has some connection with the presence of union activity.

[4] The Board's reliance upon circumstantial evidence in these cases makes the credibility of witnesses an important factor. The manner in which the witnesses testify can often assist the Board in reading between the lines. In this case we found that Siviter was less than frank under cross-examination, especially in respect of his work performance. This lack of frankness was taken into account by us in arriving at our decision.

We must emphasize that it is not a matter of this Board second guessing an employer's decision, or imposing its own notions of fairness upon the situation. Nor is it a question of whether the employer "likes unions" or is "anti-union" in some general sense. The question is whether the discharge decision was influenced in whole or in part by employee activity protected by the statute. There must be a causal connection between animus and action.

5. Section 89(7) is a little different, and much narrower. It presupposes an unfair labour practice complaint which has been settled in writing. The statute makes that settlement binding and enforceable. A party cannot repudiate these written accords, and ordinarily the Board will not go behind them. A failure to implement a settlement provides an independent basis for complaint, and may, in appropriate circumstances, support an inference of anti-union motivation in subsequent employer actions.

Credibility

6. In *DeVilbiss*, *supra*, the Board indicated that the credibility of the witnesses - particularly those tendered by the employer - could be an important factor in assessing the propriety of the employer's conduct. So it was here. Over the course of a number of days we were presented with considerable oral and documentary evidence supporting the parties' respective versions of "the facts". Not surprisingly, those versions were significantly different on material points. However, we do not think that it is necessary to embark upon any extensive analysis of the witnesses' relative credibility, or to try to reproduce, in these reasons, a transcript of the testimony, highlighting those portions which we find to be credible, credible but incomplete, mistaken, distorted, or simply untrue. It suffices to say that in assessing the witnesses' evidence we have taken into account their demeanor when giving testimony, their performance under cross-examination, the clarity, consistency and apparent quality of their recollections, the reasonableness of their version of the facts in light of contradictory evidence, their apparent ability to be objective and resist the

influence of self-interest, speculation, personal opinion, or self justification when giving their evidence, and what seems most probable in all the circumstances.

7. In applying those criteria to the evidence before us, we are constrained to conclude that Jack Fler, the owner of the company, was not a credible witness. His evidence was often marked by equivocation, prevarication, and glib self-serving statements from which he would not retreat until confronted by evidence that they must be inaccurate. He was most reluctant to give a "straight answer" to relatively simple questions touching upon his own knowledge of the union's organizing campaign or his direct involvement in the company's decision making - even when that knowledge could not be seriously disputed. These elements of distortion and self justification make Fler's testimony entirely unreliable insofar as it affects the grievor, Connie Campbell, who, in his mind, had brought the union upon him and fomented "trouble" - "trouble" being an insistence upon her legal rights and expressions of frustration when those rights were blatantly disregarded by the company.

8. On the other hand, we accept as genuine, Fler's response to the Cliche situation. Similarly, we accept forelady Jan Roberts' testimony concerning Mr. Cliche, but reject much of her evidence about the alleged peccadillos of Connie Campbell. As will be seen *infra* these alleged defaults were documented at the instance of Don Boomer, the plant manager who was a key player in the piece. There is no doubt (and it cannot be seriously denied) that Boomer orchestrated a pattern of illegal discharges designed to thwart the union's organizing campaign. Boomer was involved in both decisions to discharge Campbell. Boomer did not give evidence.

9. In contrast to Fler, the grievor Connie Campbell was generally a candid and credible witness, and (except as noted below) we prefer her testimony wherever it conflicts, on any material point, with that of any of the company's witnesses. This is not to say that we accept her version of events in its entirety, but only that, where it is relevant, we prefer her evidence over that of Jack Fler, Jan Roberts, or employee witnesses Eugene Marks or Gary Meinzinger who were called by the employer. We accept the evidence of the other union witnesses (Voelzing, Koninck, Geil, and Weber/Snider) without reservation. Grievor Cliche was also generally candid, except that he attempted to minimize the significance of the incident which gave rise to his termination. However, as we have already noted, the question is not whether Cliche's alleged misconduct was trivial or serious, but rather whether this was the real and only reason for his discharge.

The events leading up to the termination of Connie Campbell

10. The company is a manufacturer of furniture hardware, door slides, and related steel and plastic products. It operates a plant in Kitchener, Ontario, which employs approximately one hundred and thirty workers. The President and controlling shareholder is Jack Fler. At all material times the plant manager was Don Boomer. Jan Roberts is a supervisor in the assembly area where the grievor Connie Campbell worked.

11. Ms. Campbell was hired in mid August 1985 at a time when the company was actively seeking more part-time help. Her husband had worked for the company for some time, and she was hired immediately upon expressing an interest. She was put to work right away. She filled out an application form, but that was a mere formality. There was no initial consideration of the contents of her application. The company was content, so long as she could do the job.

12. By all accounts Campbell was a good worker. She almost immediately "made rate", which usually takes a new employee at least two weeks. Thereafter, she continued to perform at one hundred and forty per cent to one hundred and fifty per cent of the rated level. Since the maxi-

mum performance recognized under the company's premium payment scheme is one hundred and fifty per cent, the grievor was regularly performing at or near the optimum level.

13. Prior to the union's organizing campaign, there were no complaints about Campbell's performance, punctuality, attitude or work habits. Jan Roberts testified that, on one occasion, when the grievor was working extra hours on Friday and Saturday (her regular tour was Monday to Thursday, 4.30 p.m. to 11.30 p.m.) she lost count of the number of parts that she had produced. Roberts testified that this was not particularly unusual, nor, at the time, warranted anything other than the advice to be more careful. It never happened again.

14. Despite some later adverse comment about Campbell's absenteeism, having considered the company's employment records (which we are not satisfied are entirely accurate) and Roberts' testimony, we find that the grievor's absenteeism rate was not particularly unusual when compared to that of other employees, nor was it the subject of any adverse comment at the time. Those criticisms surfaced only after Campbell was terminated on October 10, 1985, and the company was desperately looking for some reason to do so again. By that time, the grievor had become a key union supporter, and, as such, a thorn in the company's side. Campbell was intelligent, able, outspoken, and tenacious in resisting the company's disregard of its employees' legal rights - relying on the law to protect her. Those are qualities which did not endear her to Boomer or Fler, but, among some employees, earned her the nickname of "Norma Rae" after the heroine in the movie of the same name. If this nickname is meant to signify someone who demonstrates perseverance, courage, and a determination to stand up for her rights, then it is entirely apt. For certain male opponents of the union however, she was too "pushy" and "aggressive". That was the evidence of Eugene Marks and Gary Meinsinger who were called to support the employer's alternative proposition: that even if Campbell had been illegally fired, she was an unsatisfactory employee who should not be reinstated because she would be an unsettling influence.

15. The irony is that Ms. Campbell is no radical nor was she even the initiator of the union drive. In early October, she had indicated an interest in trade union representation when approached by another employee, but had taken no active steps herself either to sign a union card or persuade other employees to do so. Ms. Campbell's role emerged only after she was discharged on October 10, 1985, because Boomer, the plant manager, believed her to be a union supporter.

16. Boomer was hired by Fler in August and remained in charge of the plant until his departure in late December 1985. Many of the company's subsequent problems can be traced to his approach to labour relations and his willingness to disregard the law if he thought it would further the company's interests. Boomer was a key figure in the events leading up to Campbell's discharge and an active participant in that decision. As noted, Boomer did not give evidence. We draw the adverse inference that his evidence would not have supported the employer's position in these proceedings.

17. On October 10, 1985, Campbell was called into the paint line office, where Boomer accused her of being the "ring leader" in an ongoing union campaign, and charged that she was using company time to solicit union supporters. Campbell denied it. Boomer said that he had been told by reliable employee sources that Campbell was involved, and that he was conducting an investigation. He said he proposed to "nip the union in the bud". Campbell was to be laid off and would not be put back on the payroll unless it was determined affirmatively that she was not a union adherent.

18. This conversation was substantially confirmed by Jan Roberts, Campbell's supervisor. The company does not deny it. It is difficult to conceive of a more blatant, overt or calculated breach of the Labour Relations Act.

19. The grievor was neither the first employee to be discharged nor the last. On October 7, 1985, Cindy Snider was fired. She was the person who had earlier asked the grievor whether she might support union representation and, together with Peter Ellis, another employee, had compiled a list of employees potentially interested. Snider had worked for the company since October 1984 and the very morning of her discharge her foreman had told her that he would be quite pleased if she was able to work extra hours. He was satisfied with her work and told her that a lead hand job was coming. Later that day, however, Boomer called Snider to his office and told her that she was over-qualified, she was upsetting the other employees, and that he and Fler were only interested in employees who would "give one hundred per cent to the company". Snider said "it's because of the union isn't it", to which Boomer replied "take it as you wish". When Snider indicated that she would file an unfair labour practice, Boomer replied "we kind of thought you would". Peter Ellis was fired the following day.

20. Fler testified that he left for Korea on the evening of October 8, and did not return until the evening of October 21. He said that prior to his departure he knew nothing whatsoever about a possible union organizing campaign or the discharges of Snider or Ellis. That was Boomer's responsibility, not his. Fler said that when he telephoned from Korea in mid-October and learned of the organizing campaign and the fact that Boomer had terminated some eight employees for suspected union activity he was completely surprised. He ordered Boomer to immediately cease and desist until he (Fler) returned. Fler said that, upon his return, he was also surprised and disappointed to learn that Boomer had disobeyed this express order and fired approximately nine more employees.

21. Is this professed lack of knowledge plausible or probable? We find it difficult to believe - quite apart from our observations about Fler's demeanour and the manner in which he gave his evidence.

22. A trade union organizing campaign is usually a traumatic event for a small employer, and certainly Boomer reacted in that way. It seems most unlikely that he would not have voiced his concerns to Fler prior to Fler's departure or outline the steps which he had taken or planned to take to "nip the union in the bud". It seems odd that he did not reveal the information received from "reliable sources" to Fler, and odder still that anti-union employees did not approach Fler with their information - as they certainly did later. At that point, Boomer had been on the job for only a few weeks and it seems improbable that he would not have advised his new employer about such a significant event which required such drastic (and illegal) action on his part. Nor does it seem likely that he would have had directly disobeyed an express order, if in fact any was given. And, upon his return, did Fler take any immediate action to reinstate the employees or repudiate Boomer's actions? He did not. Indeed, according to Fler, it appears that there was even some active debate about it, with Boomer maintaining that he was right, and Fler expressing the opposite view. However, this did not result in Boomer's departure. On the contrary; Boomer continued to run the plant and conduct himself in a way which provoked further unfair labour practice complaints.

23. Fler initially testified that he arranged it so that Boomer would no longer have *any* authority to deal with employees on *any* issue or case which had union overtones. Later Fler conceded that Boomer did retain the authority to direct or discipline employees. Fler testified, however, that the ultimate authority to discharge could not be exercised independently. The evidence discloses that despite Fler's initial disclaimer, Boomer continued to have an active role and played a part in Ms. Campbell's ultimate discharge.

24. The termination of seventeen or eighteen employees between October 7 and October

10, 1985, provoked a flurry of unfair labour practice complaints. Fler decided that he had better talk to a labour lawyer. The complaints were eventually resolved on October 26, 1985, in accordance with Minutes of Settlement framed as follows:

MINUTES OF SETTLEMENT

In the above matter the parties agree as follows:

1) The respondent agrees to reinstate and employ, *at their former rates of pay*, including bonus rate, as effective Monday October 28, 1985, *and to return them to their former jobs*, with full compensation for any time lost, but not later than five (5) working days from October 28, 1985, for the following grievors:

Cindy Snider

Connie Patricia Campbell

Stephen Campbell

David Campbell

Diane Zilinski

Fred Buehl

Jeff Voelzing

Mike Bingeman

Beth Haid

Malcolm Lampshire

Barry Kaufman

Evelyn Konink

Richard Dobson

Dean Doherty

Frank Watson

Peter Ellis

Bill Troupe

2) The respondent agrees to compensate Ron Schmuck for the days off due to his temporary lay-off in October, 1985.

3) *The respondent agrees that there will be no intimidation, discrimination, or harassment of employees because of lawful union activities;*

4) The complainant hereby seeks leave of the Board to withdraw the above section 89 complaints: Board Files Numbers 1701-85-U, 1725-85-U, 1762-85-U, 1763-85-U, 1764-85-U, 1765-85-U, 1830-85-U, 1831-85-U, 1832-85-U, 1833-85-U.

Dated at Kitchener, Ontario, this 26th day of October, 1985.

[emphasis added]

25. From the union's point of view the operative parts of the Minutes of Settlement were the return of the employees to their *former jobs*, with *full compensation*, and the undertaking that there would be no further intimidation, discrimination or harassment of employees because of lawful union activities. The union contends that in Campbell's case the employer failed to comply with either of those obligations. It continued to harass her, and on November 13, 1985, she was discharged once again. The union further notes that, more than a year later, the parties have still been unable to finalize the amount of compensation payable to the various employees who had been terminated in October 1985.

26. Despite the settlement, Campbell's return to work was not without incident. By letter dated October 28, 1985, she and other employees were directed to return. In Campbell's case she was scheduled to work as a paint line operator and was to "report to the main office at Jacmorr on or before 4.30 p.m.". That was her normal start time, but not her regular job - despite the agreement signed by the respondent two days before undertaking to reinstate the laid off employees and "return them to their former jobs". For some reason not entirely clear, Campbell's return notice also contains an additional paragraph to the effect that "it is important that you understand that by returning to work you will not prejudice or abandon any claims for compensation which are now before the Ontario Labour Relations Board". That was not on the standard form letter sent to the other employees. In addition, her return to work notice contains the handwritten direction "please report to the front office and contact Jack Fler".

27. The grievor reported to Fler's office at about 4.10 p.m., approximately twenty minutes before the scheduled start of her shift. Fler was not there, nor had he left any instructions to wait. The grievor told the receptionist that she would go to the cafeteria for a coffee and asked if she could be paged as soon as Fler arrived. The receptionist seemed content with that. There were no instructions to stay; and it was not unusual for the grievor or other employees to arrive a little early or spend a few minutes in the cafeteria before the commencement of their shift. She thought nothing of it.

28. While in the cafeteria Campbell had occasion to speak casually to some of the other employees who were naturally curious about the trade union, the terminations and the subsequent settlement. Campbell talked freely about those subjects, expressed her own views, and showed some of the employees some pamphlets she had obtained from the Ontario Labour Relations Board. Those pamphlets are produced by the Board in an effort to inform employees and employers of their rights and obligations under the *Labour Relations Act*. They are freely available to the public.

29. While in the cafeteria, Campbell was confronted by Don Boomer who was quite agitated and insistent that she go to Fler's office where, he understood, she had been directed. The grievor replied that she had already been there, but Fler was not in, and she questioned Boomer's authority to direct her about. She had been told during the settlement discussions (and Fler testified before us) that Boomer no longer had anything to do with union-related matters, and the return to work of the seventeen discharged employees certainly fell into that category. One must also remember that it was Boomer who initiated the terminations which even Fler agrees were unlawful and unwarranted. One would hardly expect Campbell to be differential, or obsequious. Tempers may even have flared somewhat, and Boomer may have considered the grievor's remarks a challenge to his authority. That is certainly the thrust of the written warning dated October 29 which threatens her immediate dismissal. According to the grievor, Boomer also expressed annoyance when told that his actions would be reported to the union. He castigated her for "running to the union" with every little complaint. However, in our view, this was all a "tempest in a tea pot", influenced as much by Boomer's frustration that he had been caught in an illegal act and forced to

back down, as any misconduct on the grievor's part. It is also interesting to note that that same day, Boomer issued another written warning to David Campbell, the grievor's husband. It too threatened that any "further disturbances or apparent efforts on your part to disrupt our company's production operations will be cause for immediate dismissal". If Boomer had been relieved of his responsibilities as Fler maintained in his direct testimony, why was he continuing to issue these threats, on the company's behalf, to known union activists? When this contradiction was put to Fler in cross-examination, Fler changed his evidence, conceding that Boomer had not been relieved of his responsibilities. As we will see later, in Campbell's case, Boomer was very active indeed. So was Fler.

30. According to Fler, he was on the plant floor when Boomer advised him that the grievor had returned and was in the cafeteria. By the time that Fler returned to his office, Ms. Campbell was waiting for him.

31. Fler was incensed and in an angry outburst, punctuated by profanity, he accused the grievor of disobeying his written instructions - although how he came to that conclusion we still cannot fathom because Campbell reported to his office *before 4.30* as directed, and it was only accidental that Fler was not present. There was no instruction that she should wait, or could not go for coffee, or was prohibited from speaking to other employees in the cafeteria before work as she usually did. Nor would such conditions be consistent with the settlement which provided for unconditional reinstatement. We do not doubt the depth or reality of Fler's anger, but that reaction can be traced more directly to the grievor's union activity and the challenge it posed to his previously unquestioned managerial authority, than to any misconduct on her part.

32. Fler said that he did not want to reinstate Campbell, now, and was irritated by what he considered to be "dressing down" Boomer in front of the other employees. He said, she had no right to address senior personnel in that way or to criticize them openly. Fler said that he was tired of all the troubles caused by the union the grievor had started in the plant, and if there was any further "ruckus" he would bring a gun and escort her off the premises. He wanted to settle things down and she was not "being fair". She was "running around creating havoc". Fler was particularly irritated that she had been talking about the union to other employees, and warned her that she should not do so on company premises or company time. Throughout this tirade, Campbell remained relatively calm, except to point out that the company's problems had been caused, in large measure, by the illegal discharge of seventeen employees.

33. Following her interview with Fler, Campbell returned to work. But she did not return to her former job - despite the terms of the settlement. She was placed at a work bench behind the paint line, away from other employees and with her back to them. The only person close by was Boomer, who came to watch her for a period of time. She had never done that kind of work before and had some difficulties. Her supervisor would not reveal the rate for the job or the anticipated level of production so she could not determine whether she was meeting the established norm.

34. She remained on that job for two shifts. She was then switched to another job behind the plastics department, and, again, away from contact with other employees. In this position she was required to insert one part into another but encountered problems because the parts she was given were not the proper size. When she brought this to the supervisor's attention, she was told to work away at it nonetheless. The entire order had to be re-machined the next day.

35. Mr. Fler hypothesized (he had no direct knowledge) that the apparent difficulty could probably be traced to the fact that some of the parts were produced in accordance with Imperial measurements, while others may have been imported from Europe and had been produced to metric specifications. Nevertheless, that problem should have been immediately obvious, and it is

difficult to resist the conclusion that the jobs assigned to Campbell upon her return to work were not only contrary to the terms of the settlement, but were also a form of harassment because of her trade union activity. The grievor believed that she was intentionally isolated and given unfamiliar jobs either as a form of reprisal or a "set up" for some future claim of inadequate performance. In all probability she was right. As we have already mentioned, Boomer did not give evidence, nor did supervisor Cassonell, who apparently had a hand in assigning the grievor to these positions.

36. The grievor's concerns became part of a second, omnibus unfair labour practice complaint alleging that a number of the 'returnees' had not been placed in their former positions, had been given undesirable jobs, had been subjected to harassment, had received formal warnings (like David and Connie Campbell) or had been told that any default or apparent failure to be co-operative would lead to dismissal. By this time, there was active opposition by an employee group opposed to the union led by Mark Marchand and Gary Meinsinger. There was also a certification application relying upon section 8 of the *Labour Relations Act*. Section 8 reads as follows:

Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

37. These issues and controversies were purportedly resolved in accordance with a new settlement dated November 7, 1985, in which:

- 1) the employer granted the union voluntary recognition;
- 2) the union withdrew its outstanding certification application and section 89 complaint;
- 3) the employees objecting to the union withdrew their statements of opposition;
- 4) the parties agreed to a mechanism (arbitration) for quantifying the sums owing to the laid off employees under the previous settlement;
- 5) the company agreed to remove the reprimands from the records of several employees including Ms. Campbell;
- 6) the company agreed to re-hire certain employees who, it had been said, had quit because of employer harassment; and
- 7) it was agreed that certain employees, including Ms. Campbell, should be returned to their former position.

The company further agreed that future transfers and assignments of work would not be made on the basis of union membership or activities and that it would comply with the Minutes of Settlement dated October 26, 1985. Those Minutes, it must be remembered, included an undertaking that there would be no further intimidation, discrimination or harassment of employees because of lawful union activities. It was agreed that the November 7 Minutes of Settlement would constitute a "section 89 settlement" which could be enforced pursuant to section 89(7). Finally, the settlement included an undertaking by the Union not to institute any proceedings against the company for any incident which arose prior to November 7, 1985, and a stipulation that no evidence of any

incident which arose prior to that date would be relied upon. The document was signed, on behalf of the union by various individuals including Connie Campbell, by Jack Fler for the company, and by Gary Meinzinger and Mark Marchand for the objecting employees.

38. Following Ms. Campbell's return to work on October 28, 1985, her career was short-lived. In this respect, we should note that we place only minimal reliance upon the company's daily attendance records which are obviously in error for this period. If those records are to be accepted, she worked only one day before being fired, again, on November 13. Clearly, she worked more than that, and, we accept Ms. Roberts' explanation that the days she worked were not recorded on the attendance sheet because she was out of her regular department. On November 5 and 6, she was absent because she had the flu. Such absence was verified by a doctor's note. On November 7 she was attending at the Labour Relations Board to conclude the settlement mentioned above. On November 8, we accept Campbell's evidence that she was available for work but was not called. The recorded absence is, we find, an inaccuracy in the employer's records. In any event, since the company had always regarded work on Friday and Saturday as "extra hours" which were optional, no significance could be attached to them. There was no work available on Monday, November 11, or Tuesday, November 12. The grievor was not called - in. On November 13, she was fired.

39. We set out these details not because we give any credence to the suggestion that the grievor had an attendance problem, but rather to demonstrate the company's attitude during this critical period, and later, when it was pressed to explain why an otherwise productive employee had been discharged. In cross-examination Fler admitted that Campbell's attendance sheet was part of the personnel file, and that *he had been keeping track of her attendance since he got back from Korea on October 21*. He further admitted that she was the only employee whose attendance he tried to monitor. At first, he said that he was "just interested". Later he conceded that it was because of the "problems" he was having with her at the time. Those problems, of course, were her support for the trade union and insistence upon her statutory rights. Thus, as early as his return from Korea, Fler began to focus on Connie Campbell as the source of his labour relations difficulties.

40. In his efforts to (in his words) "settle things down", Fler did more than confront Campbell on October 28 and monitor her attendance from the date of his return from Korea. He went out on the shop floor and actively "asked around" about the grievor and her activities. Not surprisingly, her name kept "coming up" in discussions with employees opposed to the union such as Danny Burns or Mark Marchand. It was from Burns and Marchand that Fler learned that the grievor might have committed a criminal offence some years before when she was a teenager living in British Columbia. Fler was also told that she was "bothering people" and using the telephone too much. From these conversations he concluded that she was a "road block" to his efforts to control the situation, that she was disobedient, and that she was "breaking the rules" (whatever that means). Fler was annoyed that, despite his reinstatement of the seventeen discharged employees and his later agreement (following further unfair labour practice charges) to abide by his October 26 settlement, the grievor was still actively urging employees to join the union and support the drive for collective bargaining. The scene is reminiscent of the earlier situation where Boomer said he had been informed of the grievor's support for the union. Apparently, there was no shortage of informers.

41. We should perhaps digress for a moment to address a persistent theme in Fler's testimony: that because he would prefer a return to the quiescent *status quo*, the grievor should discontinue her trade union activity on company premises. A related theme was his opinion that she should not discuss the union, Boomer's response to it, the unfair labour practice complaints, the settlements, or any related matters during working hours. This opinion seems to be based upon the

view that an employer has the right to control what employees talk about while they are at work. That is not the case. If employees are permitted to talk about their home life, the latest conflict of interest scandal reported in the newspapers, the relative merits of the Liberals versus the Conservatives or the Red Sox versus the Mets, they are entitled to discuss recent happenings in the work place, the pros and cons of collective bargaining or their rights under the *Labour Relations Act* - so long as such discussion does not interfere with their primary obligation which is to work. Section 71 of the Act does not *authorize* employees to persuade others, during working hours, to become or refrain from becoming a union member; however, the section does not *prohibit* such activity either.

42. Exhibit 4 entitled "Probationary Employee Appraisal" was tendered in evidence as a purportedly objective assessment of Campbell's performance, after a 90 day probation period. The form indicates that her ability is "good", her conduct and performance are "fair" and her attendance is "poor". The form is dated November 11, 1985, and includes a notation that the signatory, Jan Roberts, would *not* recommend retaining Campbell as a permanent employee. In the "comments" section one finds the following:

I have questioned the accuracy of piece count on one occasion admitted losing count and over-reporting by about three hundred pieces. Attendance not suitable for production work.

There is also a notation about "reports" of the grievor leaving her work station - "reports" which Roberts said were never made to her even though she was the grievor's immediate supervisor.

43. What was the origin of this appraisal, done barely two days before the grievor's discharge? It is rather interesting both because it involved Don Boomer, and because on this branch of Ms. Roberts' evidence, we did not find her to be a very candid or credible witness. She was hesitant and quite reluctant to discuss how she came to fill out the form in the way that she did.

44. None of the employees who gave evidence had ever heard of a ninety day probation period let alone a probationary employee assessment. As far as they knew, no similar appraisal had ever been done on them, nor was any other employee appraisal put into evidence. Roberts admitted that, except for the single miscount which was not regarded as particularly significant at the time, she had never discussed with the grievor any of her supposed faults. Nor did she consult with Dale Voelzing who was Campbell's immediate supervisor on the evening shift. Roberts only stayed past five o'clock to complete unfinished paper work and, accordingly, did not have any direct involvement supervising the grievor. Yet she expressed an opinion about Campbell's performance without ever raising the matter with Voelzing who had that responsibility. Voelzing testified that Campbell had no attendance problems, no performance problems, and did not leave her work station. That judgment is confirmed by the fact that she consistently earned one hundred and forty to one hundred and fifty per cent above the standard rate. Roberts never advised Voelzing of any concerns about the grievor's performance, and he was at a loss to understand the entries she made on the probationary employee appraisal form.

45. However, we are not surprised, considering the way in which the appraisal came about and its subsequent use. It was Boomer who approached Roberts on November 11 to have a "rating" done on the grievor. According to Roberts, Boomer went over the form with her, asking why they wouldn't want the grievor around. The comments about "leaving her work station" were Boomer's. Roberts had never encountered that problem, and in fact could not, because she was seldom around when Campbell was working. Boomer said that this had been reported to him by others, and Roberts duly recorded it. Roberts had heard that story before. Prior to the grievor's first termination Boomer had told her that "his sources" had indicated she was soliciting union

support during working hours. Boomer took the appraisal form to the main office to put in Campbell's personnel file.

46. In cross-examination Ms. Roberts said that she only did two or three appraisals in all. None of those appraisals was ever produced. None made their way to the office or the employees' personnel file. Ms. Roberts said she still had them in her desk. There is no evidence that any of those appraisals (assuming they exist) were initiated by the plant manager or completed upon his instructions.

47. The evidence points suspiciously to the conclusion that Boomer was "building a case" for the grievor's termination. Having been "caught out" twice before, and reminded by the grievor herself that she could not be discharged for union activity, Boomer sought to construct a justification for her termination based upon allegedly poor performance. That inference is strengthened by the way in which the performance appraisal subsequently surfaced on November 13, the day the grievor actually was discharged. It was included in a *sealed* envelope with her final pay cheque handed to her at the end of a short interview. According to Fler, he had never seen the appraisal before (which is hard to believe) but had instructed that a final pay cheque be issued for the grievor, with related termination documentation, "just in case" he might need it on November 13 if he decided to fire her.

48. On Friday, November 8, 1985, the day after the settlement recognizing the union, Ms. Campbell visited the company's main office to pick up some pay cheques. While there, she casually told the office person what had happened the day before, and left a copy of the settlement document. This was duly reported to Fler who took great umbrage at what he considered to be "union activity" during the office employees' working hours. At first he testified that *two* office employees had complained to him that Ms. Campbell had tried to persuade them to join the union. Later he said one employee complained.

49. Perhaps that is what Fler really believes, but no office employee gave evidence to that effect or produced the "union literature" which Fler mentioned in his evidence. On balance, we prefer Campbell's version of events which is uncontradicted by any direct evidence. But even if we did not, for the reasons outlined above, we would not accord much significance to brief casual remarks about the union. However Mr. Fler obviously did. This was later cited as one of the reasons for Ms. Campbell's discharge on November 13. This was one of the "rules" the grievor had broken. She had talked in a cursory and casual way *about the union*.

50. On Sunday, November 10, 1985, there was a union meeting to select the employees who would make up the union's bargaining committee. The persons selected were: Connie Campbell, Louise Boone, Mark Marchand, and Gary Meinsinger. Marchand and Meinsinger, of course, had been the representatives of the employees opposed to the union and they were not pleased with Campbell's presence on the bargaining committee. Nor was Campbell pleased by the result, since she believed (not unreasonably) that employees who had circulated a petition opposing union representation were unlikely to be firm proponents of collective bargaining or sincerely concerned about promoting the rights of employees or protecting the rights of union supporters whose activities had resulted in the establishment of the collective bargaining relationship. These reservations were merely reinforced in Campbell's mind when Meinsinger told her that she had no business talking to the office girls about the trade union or trying to organize them, and that the employer was going to discipline her for it. As it turned out, that was an entirely accurate portrayal of Fler's views about what happened and an accurate prediction of the company's actions on November 13.

51. How could Meinsinger possibly know about the events in the office on Friday, November 8, the company's characterization of those events, and the company's intended response, if he

did not talk to Fler, Boomer, or some other managerial person who was concerned about what had happened and was determined to take some action? Meinsinger's evidence in this regard was evasive and, in our opinion, his memory was conveniently deficient. He said that he did not know who he had talked to, but heard a "rumour" that the company intended to discipline Connie Campbell because of her allegedly improper discussions with the office employees on Friday, November 8, 1985. He couldn't really remember the source of that "rumour" (which, we repeat, turned out to be a rather accurate assessment of Fler's state of mind and prediction of subsequent events).

52. In our opinion, the most plausible explanation is that Meinsinger had been talking directly to Fler. This is entirely consistent with the relationship between the two men revealed in the evidence before us. Not only was Meinsinger quite willing to give evidence on behalf of the company to the effect that Campbell was a troublemaker whose return to employment would cause problems, but also, he was the person contacted by Fler to investigate the grievor's assertion, at the hearing, that she had been returned to an isolated position - even though it was supervisor K. Cassonell (and perhaps Boomer) who were involved in that work assignment. Meinsinger, working on the day shift, could have no direct knowledge about those matters, yet it was Meinsinger that Fler called to find out about the grievor's situation. Meinsinger was Fler's "contact" upon whom he relied for information.

53. It is also interesting to note Fler's reluctance to admit any knowledge of the identity of those who had circulated the petition against the union. He said that he had "heard" by November 13 about the election of the bargaining committee but he denied *any knowledge* of who the anti-union petitioners were. He said he did not know that Marchand and Meinsinger were the leaders of the anti-union petitioners and he only grudgingly admitted that Campbell was a key union supporter. Yet on November 7, 1985, Mr. Fler had affixed his name on the settlement document beside that of Ms. Campbell (and others) for the union and Meinsinger and Marchand for the objecting employees. He obviously knew who the objectors were. His testimony in this regard was, quite frankly, a clumsy lie - entirely typical of his evidence, in general. Like his recognition of the union, grudgingly given in the face of a section 8 application which was sure to be successful, he was dragged reluctantly, to the truth only when confronted with evidence which he could not plausibly deny.

54. The culminating incident occurred on November 13, 1985. Fler testified (as we have already mentioned) that in the course of numerous discussions with employees, the grievor's name "kept coming up" and "knowing the problems I had with Connie" Danny Burns and Mark Marchand volunteered the rumour about her criminal record. Fler said that since he was always running into "road blocks" from her, he decided to check her employment application - just as he had been tracking her attendance since his return from Korea. The application form contains a question about previous criminal convictions. There was a "No" written in the space provided. Fler decided to confront Ms. Campbell with the rumour and the application form to gauge her response. He told the Board however that the fact of a criminal record was in itself, quite irrelevant. He made no effort to verify the rumour because, he said, it had nothing to do with her suitability as an employee. He did take the precaution of having her final cheque and termination documents ready - "just in case".

55. The precise contents of the conversation on November 13 are a matter of some dispute. It seems to be common ground that the grievor was presented with the application and asked if it was accurate. After a cursory examination, the grievor said that it was. She testified that she did not appreciate the "drift" of the conversation, so she just gave the document a quick glance to verify that it was hers. Campbell was then asked specifically, about the criminal record and said either that she did not write in "No" or could not remember doing so. However according to Jan Rob-

erts, what Fler found most distressing was the grievor's response to his question: "do you think I wrote it in". She allegedly said: "you could have". At that, Fler supposedly responded that he didn't want anyone who accused him of such a thing working for the company. Fler testified that he felt that he had lost face, and "it made me feel like I had to prove myself". Fler was affronted that the grievor would suggest, as he put it, "as President of the company I would stoop so low as to alter a document".

56. Campbell denies that part of the conversation and, according to her testimony, the topic of discussion immediately shifted to her work performance, the probationary assessment, and Fler's assertion that she was not "Jacmorr material". We accept only the latter part of her submission on this point. We think that she probably did make some flippant comment such as "you could have", and that Fler was angry and thought he was being challenged. However it is important to put that comment into perspective. Campbell had no reason to trust Fler or give him the benefit of the doubt. She had been unlawfully fired by Boomer who was present during the conversation. That termination was described by the company as a lay-off for lack of work, which was obviously false. She had been reinstated pursuant to a settlement which the company had not honoured. She had been threatened by Boomer with discharge again (a threat purportedly removed after a second unfair labour practice complaint, but obviously still on Fler's mind, since it formed part of his reason for her later discharge). She had been harassed while on the job. Moreover, (although she did not know the details at the time) an inaccurate and misleading evaluation had been produced, and her final pay cheque had been prepared, in advance "just in case" it might be needed. In our opinion, the grievor can be forgiven for a certain amount of cynicism about the company's good faith or intentions.

57. Despite the grievor's discharge, she continued to serve on the negotiating committee where, we do not doubt, she was an effective advocate. Ms. Campbell does not have much formal education but she is intelligent, well spoken, and, of course, more firmly committed to the process of collective bargaining than Meinsinger or Marchand. She was determined to achieve a good collective agreement for the employees even if it meant that she might appear, to others, to be "pushy".

58. In April, 1986, the company delivered an ultimatum that it would refuse to meet so long as the grievor remained on the bargaining committee. Various reasons were advanced for this position. It was said that the grievor was "leaking information" about the bargaining to other employees. At another point, the company's negotiator (who did not give evidence) said that she had been counselling employees not to work overtime. The company demanded that she step down from the committee until these allegations had been cleared up. The grievor denied the allegations and refused to step down. The union threatened to file an unfair labour practice complaint.

59. The company eventually backed down when it turned out that its accusations were totally unfounded. This incident is but another example of the employer's readiness to jump to conclusions, identify Ms. Campbell as the source of its problems or ascribe some improper motive to her. It also reveals that union opponents in the plant continued to keep the company informed about the grievor's activities and to pass on any rumour or innuendo which might undermine her position.

60. In direct and cross-examination, Mr. Fler outlined a number of reasons why he considered it necessary to discharge Ms. Campbell. Some of these reasons have already been mentioned. She was causing "trouble". She was a "road block" to "settling down the plant". She was "bothering people" (about the union). She was "running around the office creating havoc" (referring to the incident described above where she gave a copy of the settlement to an office person). She was

not prepared to follow instructions (i.e. the October 28 incident when she went to the cafeteria rather than await Fler's arrival). She had confronted Boomer in the cafeteria - an event which led to a disciplinary letter, an unfair labour practice complaint, and a settlement in which the company purportedly undertook to remove the disciplinary notation from her record yet now seeks to rely upon it. She was untruthful and disrespectful in the discussion on November 13. She had challenged Fler's integrity.

61. We have considered the evidence. We have considered the company's submissions. We have considered the alleged grounds for Ms. Campbell's discharge. We have considered the veracity of the employer witnesses and the plausibility of the reasons advanced for her termination. We find that her discharge was motivated in whole or substantial part by a desire to remove her from the work place because she was a union adherent, and an active supporter of the employees' collective bargaining rights. It was a breach of sections 64 and 66 of the *Labour Relations Act*, as well as the terms of the two previous settlements which included a "no reprisal" clause.

62. It was Campbell who initially mobilized the union supporters. It was Campbell who refused to bow to Boomer's intimidating and grossly illegal conduct - conduct which even the company does not now condone. It was Campbell who was the sole union enthusiast elected to the negotiating committee on Sunday, November 10, 1985 - just three days before her discharge and a week after she had signed the November 7 settlement on behalf of the union. It was Campbell who, to the employer's knowledge had held numerous meetings in her home to encourage employees to support the union. It was Campbell who had reminded Fler that the company was not above the law. She really was a principle source of "trouble", if by that term one means an employee's assertion of her legal rights or the obligation to bargain collectively. So long as she remained at work Fler and Boomer faced a challenge to their previously unfettered managerial prerogatives and in their effort to get rid of her, any pretext would do. We find that she was fired because of her trade union activity.

63. We shall deal more fully with remedy later; however, at this point it is necessary to note two specific arguments raised by the employer. In urging us not to find an unfair labour practice, counsel for the employer asked, rhetorically "what did the employer have to gain?", and even put that question to Ms. Campbell. Counsel asserted that, having recognized the union, and undertaken the process of collective bargaining, there was no "reason" for the employer to commit an unfair labour practice. Counsel further contended (initially at least) that even if the discharge was motivated by anti-union considerations, Ms. Campbell should not be reinstated because she was a disruptive influence in the plant, and her relationship with Fler, the company owner, and some of the other employees was irrevocably poisoned. Eugene Marks and Gary Meinsinger, testified on behalf of the employer, to the effect that things "settled down" in the plant when the grievor's disruptive influence was removed. Their opinion was that the grievor should not be reinstated because she might "stir things up" again.

64. There are several answers to this. In the first place, the employer recognized the union only in the shadow of its own grossly illegal conduct and a certification application relying on section 8 of the Act which was likely to be successful. Even then, the employer awaited confirmation that the union represented at least fifty per cent of the employees - something that was prudent from the union's point of view to protect it from a subsequent termination application (see section 60 of the Act). The employer did not honour its first settlement, and despite the settlement of a later complaint, which purportedly removed a written reprimand from the grievor's record (concerning the cafeteria incident), that same issue surfaced again in Fler's reasons for discharging her on November 13. The company did not comply with the second settlement either. It fired Ms. Campbell because of her union activity. The parties now have a collective agreement (which has

twice been challenged by dissenting employees), but almost a year after the seventeen employees were terminated, the amount of compensation to which they are entitled has still not been finalized.

65. In fact, the employer had quite a bit to gain from firing the grievor - as Fler frankly indicated, although putting a different construction on his motive. The grievor was a leader with courage and determination not to be bullied or denied her statutory rights. She was the one most responsible for mobilizing employee support for the union. She believed that "the law" would protect her. Her removal from the work place would undermine the cohesion of the union supporters, encourage and support union opponents, and send a graphic message to employees about what happens to those who challenge the employer's authority or assert their statutory rights. Ms. Campbell's fate would certainly give pause to any employee contemplating union office, a position on the bargaining committee or any other union role which would bring him/her to the particular attention of the employer. To be identified as a "key union supporter" is to court discharge - an action which would be abetted and applauded by the anti-union employees. Even if Ms. Campbell was ultimately reinstated (as we find she should be) the employer has been successful in keeping her out of the plant for more than a year. With the passage of time, employee turnover, the continuing efforts of the anti-union employees, and the example of what befalls those who support the union too vocally, the union's support has, quite probably, been seriously eroded.

66. What of the evidence of Marks or Meinsinger that Campbell was a "troublemaker" or too "pushy". We give no effect to it whatsoever; nor is it important, in our view, that Fler may have "lost confidence" in her, or that there may be some continuing friction between them. An unfair labour practice complaint is not a popularity contest. Few employees would ever be reinstated if the Board considered their employer's reluctance to have them back.

67. We were also troubled by Marks' evidence, under oath, that he had accepted the union and the collective bargaining relationship when it is perfectly plain (and not disputed by the employer) that he has supported two proceedings before this Board attacking the union's bargaining rights and the collective agreement. There is nothing wrong with that. There is nothing wrong with opposition to the union. Marks would have been more candid to simply admit it, rather than making comments which are simply unworthy of belief. His readiness to utter outright lies suggests much about the difficulties which the union may have in establishing a viable collective bargaining relationship.

The Cliche Case

68. Steven Cliche began working for the company in early September 1985. He was employed primarily as a press operator, and worked, without incident, until his discharge in mid-December 1985. Like the other employee witnesses, he had never heard about any probation period. Cliche was fired because of an alleged incident involving a female employee about twice his age. Cliche and the employer have quite different views about the gravity of his alleged "offence".

69. According to Cliche, he was "playing around" one morning and delivered a friendly kick to the behind of Amy Hillier, a fellow worker. Hillier told him to "watch his manners". He apologized for what he described as a "playful nudge" and said that he didn't mean anything by it. The next morning, however, Hillier refused to follow Cliche's advice about the proper way to carry out a particular work function, prompting Cliche to become annoyed and call her a "fucking idiot". In the grievor's submission these incidents were trivial. The employer's reaction was out of all proportion to the events and was motivated by his support for the union.

70. According to Jan Roberts, Amy Hillier did not consider it trivial. Roberts testified that

Hillier came to her office crying. Hillier declared that she would no longer work in Robert's department and that she did not have to put up with being kicked or sworn at. Hillier threatened to quit. Roberts was concerned because Hillier was a valuable employee with many years service. Roberts did not want to lose her.

71. Roberts approached Cliche and sent him home "pending investigation". She then reported the situation to her superiors. Boomer said that she had done the right thing. Fler said to leave Cliche "on suspension" and he would take care of the matter. Later, when Cliche phoned Roberts he was directed to speak to Boomer. Boomer was unwilling to discuss the matter on the phone. Cliche learned of his termination a few days later when he received his final pay cheque and separation certificate in the mail.

72. Fler testified (and on this matter we believe him) that he did not approve of what Cliche had allegedly done, and sought the advice of Madigan who had been retained to negotiate the collective agreement. Madigan told him that there were grounds for discharge, and while Fler was not sure whether Cliche was a probationary employee, Fler knew that Cliche had not been around very long. He did not question the report received from Roberts, investigate further, or ask Cliche for his side of the story. He simply directed the office staff to mail Cliche his termination papers.

73. Cliche was neither an early nor active union supporter. In early to mid-October he attended a union meeting together with fifty or sixty other employees. Boomer stationed himself outside the meeting place where, for a time at least, he may have been able to identify some of the employees who chose to attend. However, there is no direct evidence to show that Boomer saw Cliche nor, if he did, was there any reason for Boomer to believe that Cliche was a particularly active union supporter. There was nothing to distinguish Cliche from the other workers who went to the meeting. Given Boomer's willingness during this period to fire anyone thought to be connected with the union, the fact that Cliche was spared, probably indicates either that Boomer did not know that Cliche was at the meeting or attached no particular significance to his attendance. Cliche was not fired until two months later and, in contrast to Campbell's situation, there is no evidence that he was regarded as a "troublemaker" or a key union supporter.

74. This is not to say that Cliche's discharge was "fair", or that a termination was the most appropriate response in the circumstances. It may well be that Fler should have considered his side of the story, or that a discharge was an over-reaction. It may well be that a discharge was "unjust" and that the employer's interests would have been adequately protected and promoted by some lesser penalty. But that is not really the point. The question before us is whether the decision to discharge Cliche was motivated by his participation in the trade union or other activities protected by the *Labour Relations Act*. We find that it was not. His complaint must therefore be dismissed.

Remedy

75. We have already discussed Ms. Campbell's case at some length. We have no doubt whatsoever that she was victimized because she was identified as a union supporter, but we are not entirely sanguine about returning her to a work place in which she will inevitably face the hostility of both the employer and those employees who continue to oppose the union. If we are to carry out our statutory mandate, we should try to devise a remedy which, insofar as possible, puts Ms. Campbell and the union in the position that they would have been in had she not been unlawfully discharged and, again, insofar as possible, neutralizes the advantages which the employer may have gained by its own unlawful conduct. Those advantages include keeping her out of the work place, for a year, while this litigation proceeded and the chilling effect which Ms. Campbell's discharge would likely have upon other employees who might fear for their jobs if they were identified as union supporters.

76. Boomer's response was heavy-handed and overt. Fler's response was more subtle and specific. The message was the same: employees who supported the union would face reprisals. The fact that there was a network of anti-union informers, prepared to report to Fler about the activities of their fellow-workers, would only heighten the employees' apprehensions. In the circumstances, it is difficult to construct a remedy which fully reflects the industrial relations reality, and the real possibility that, by its illegal conduct, the employer may well have accomplished its objective. There are not very many employees with the fortitude of Ms. Campbell and, in our experience, when employees are presented with the choice of renouncing their support for a union or facing employer hostility and reprisals, they often embrace the former option. A discreet discharge here and there may not even be particularly expensive or uneconomic from a long run point of view for (to adopt Boomer's phrase), a few selective discharges may "nip the union in the bud" - particularly if the employees victimized do not have an inexpensive and expeditious remedy for the violation of their statutory rights. They are faced with immediate unemployment and potential penury while this Board conducts its hearings and deliberates. It is not a well balanced equation, - particularly since the employer's superior ability to bear the costs of litigation may itself become a tactical consideration.

77. In order to redress an unfair labour practice complaint which necessarily effects the grievor, other union supporters, and the union itself, we make the following declarations and remedial directions:

1. We find and declare that the grievor, Connie Campbell, was discharged contrary to sections 64, 66 and 89(7) of the *Labour Relations Act*. We find and declare that she was discharged because of her trade union activity, not because of any default or culpable misconduct on her part. The allegations raised to discredit her were mere camouflage and a pretext to hide the employer's illegal intentions.
2. We direct that Ms. Campbell be reinstated in employment *forthwith*, to her *former job*, or some *other job* agreeable to *her* and for which she is suited, with full accumulated seniority.
3. We further direct that Ms. Campbell be compensated, *forthwith*, for all wages and benefits lost, and all other losses sustained by her between the date of her termination and the date of her reinstatement pursuant to this Board order. Such compensation shall include interest calculated in accordance with Practice Note 13 and must be paid, in its entirety, within twenty-one (21) days of the release of this decision. If such compensation is not paid, in full, or some question arises about the amount owing to Ms. Campbell, the present panel of the Board will remain seized and will schedule a hearing, on a peremptory basis, if necessary, to deal with the matter. We do not want Ms. Campbell to face the same difficulties as those employees discharged in October 1985, whose entitlement to compensation has still not been finally resolved.
4. For reasons similar to those enunciated in *Radio Shack*, [1979] OLRB Rep. Dec. 1220, affirmed by the Divisional Court at 80 CLLC at para. 14,016 and again at para. 14,017, the respondent is directed to post copies of the attached Notice marked "Appendix" after being duly signed by Mr. Fler, the respondent's representative. Copies of this Notice must be posted in conspicuous places on the employer's premises

where they will most likely come to the attention of the employees. Reasonable steps must be taken by the company to ensure that the said Notices are not altered, defaced, or covered by any other material. Reasonable physical access to the premises must be given to the union so that it can satisfy itself that this posting requirement has been and is being complied with.

78. Given Ms. Campbell's pivotal role in organizing the union and the subsequent uncertainty, misrepresentation and inuendo surrounding her discharge advanced by the employer and certain friendly employee witnesses, we consider it imperative to demonstrate to the employees that their employer's position is not the last word or the only version of the truth, and that they can rely upon the Board to conduct an impartial adjudication of their rights. Employees, like Cliche, who engage in inappropriate conduct, cannot expect to shield themselves behind the *Labour Relations Act*, but, by the same token, union adherents, like Connie Campbell, cannot be victimized. To this end, and in order to help dispel any residual questions, concerns, suspicions, or fears of the employees, we hereby direct that the employer provide a copy of this decision at its own expense to all current employees. A posting of the decision is not enough. An employee who must scan a Board decision hurriedly, while at work, will not be able as easily to absorb its meaning and hence understand its significance (and his/her legal rights) as an employee who can read the decision, at home, in a more relaxed fashion.

79. In view of the opposition, by Fler and others, to Ms. Campbell's return, we believe she should be accorded certain specific protections lest the employer be tempted to treat the Board's Order in the same way as it treated the previous settlements - purporting to accept them, but, all the while, seeking some pretext to remove Ms. Campbell from the work place. We therefore direct as follows:

- (1) For the period of two years from the date hereof, the employer must not hold any meeting with Ms. Campbell which involves or could potentially result in discipline, unless she is first given a full and complete opportunity to have present, the trade union representative of her choice.
- (2) No discipline or termination shall be imposed upon Ms. Campbell unless she, and the union, are advised, in advance, in writing, of the specific reasons therefor.
- (3) Ms. Campbell shall be allowed free access to her personnel file in order to review any and all documentation contained therein. Such file shall contain all material upon which the employer intends to rely in its dealings with her.

80. Finally, the Board directs that the respondent and its officers and any person acting on behalf of the respondent cease and desist from:

- (a) interfering with the formation selection or administration of the trade union;
- (b) refusing to employ, continuing to employ or discriminating against a person, in any way, because s/he was or is a member of the union or was exercising rights under the Act;
- (c) threatening or penalizing employees because they have been or may

become members of the union or have or may exercise any rights under the Act.

81. The Board will remain seized in case there is any difficulty implementing any aspect of this decision and remedy.

Appendix

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD, ISSUED AFTER A HEARING IN WHICH BOTH THE COMPANY AND THE UNION HAD THE OPPORTUNITY TO PRESENT EVIDENCE. THE BOARD PANEL HEARING OUR CASE CONSISTED OF A VICE-CHAIRMAN, A BOARD MEMBER REPRESENTING EMPLOYERS AND A BOARD MEMBER REPRESENTING EMPLOYEES. THE ONTARIO LABOUR RELATIONS BOARD HAS RULED, UNANIMOUSLY, THAT WE HAVE VIOLATED THE ONTARIO LABOUR RELATIONS ACT, AND HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

- TO ORGANIZE THEMSELVES;
- TO FORM, JOIN, OR HELP ESTABLISH TRADE UNIONS;
- TO ACT TOGETHER FOR COLLECTIVE BARGAINING;
- TO REFUSE TO DO ANY OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT WE WILL NOT DO ANYTHING TO INTERFERE WITH THESE RIGHTS.

IN PARTICULAR

WE WILL NOT THREATEN OUR EMPLOYEES WITH DISCHARGE OR ANY OTHER FORM OF REPRISAL BECAUSE THEY HAVE JOINED A UNION OR WISH A UNION TO REPRESENT THEM.

WE WILL NOT DISCRIMINATE, PENALIZE OR DEPRIVE OUR EMPLOYEES OF WORK, POSITIONS, OR BENEFITS BECAUSE THEY HAVE SUPPORTED A UNION.

WE WILL NOT ATTEMPT TO GET EMPLOYEES TO INFORM UPON THE UNION ACTIVITIES OR SYMPATHIES OF THEIR FELLOW EMPLOYEES.

WE WILL NOT REWARD EMPLOYEES WHO INFORM ABOUT THE UNION ACTIVITIES OR SYMPATHIES OF THEIR FELLOW EMPLOYEES NOR PENALIZE EMPLOYEES WHO EXPRESS THOSE SYMPATHIES.

WE WILL NOT INTIMIDATE, COERCE, OR PRESSURE EMPLOYEES, IN ANY WAY, INTO WITHDRAWING SUPPORT FOR THE UNION.

WE WILL NOT, IN ANY OTHER MANNER, COERCE, INTIMIDATE OR RESTRAIN ANY OF OUR EMPLOYEES IN THE EXERCISE OF ANY OF THEIR RIGHTS UNDER THE ACT.

IN ACCORDANCE WITH THE BOARD'S DIRECTION:

WE WILL IMMEDIATELY RETURN CONNIE CAMPRELL TO HER FORMER JOB, OR SUCH OTHER JOB AS IS AGREEABLE TO HER, AND FOR WHICH SHE IS SUITED.

WE WILL IMMEDIATELY PAY COMPENSATION (INCLUDING INTEREST) TO CONNIE CAMPRELL FOR ALL WAGES AND BENEFITS LOST BETWEEN NOVEMBER 13, 1985, WHEN THE BOARD FOUND SHE HAD BEEN UNLAWFULLY DISCHARGED, AND HER RETURN TO WORK.

WE WILL NOT IN ANY MANNER WHATSOEVER DISCRIMINATE AGAINST, COERCE, RESTRAIN, INTIMIDATE OR PENALIZE MS. CAMPBELL BECAUSE SHE HAS OR MAY EXERCISE HER RIGHTS UNDER THE LABOUR RELATIONS ACT.

THE BOARD HAS DIRECTED THAT A COPY OF ITS DECISION BE PROVIDED TO ALL OF OUR EMPLOYEES SO THAT THEY WILL BE FULLY INFORMED ABOUT THE PROCEEDINGS BEFORE THE BOARD. WE WILL COMPLY WITH THAT DIRECTION.

JACMORR MANUFACTURING LIMITED

PER: _____
(AUTHORIZED SIGNATURE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

2265-86-R; 2266-86-R; 2267-86-R United Brotherhood of Carpenters and Joiners of America, Local 27, Applicant, v. **Metro Railing Ltd.**, Respondent

Bargaining Unit - Certification - Construction Industry - Certification sought for a single all employee bargaining unit to include both employees engaged in construction work away from the employer's premises as well as employees engaged in non-construction work at employer's factory - Separate construction and non-construction units appropriate because there is no common work force

BEFORE: *Harry Freedman*, Vice-Chairman, and Board Members *F. W. Murray* and *H. Kobryn*.

APPEARANCES: *J. David Watson*, *Frank D'Abbondanza* and *Frank Rimes* for the applicant; *Mark D. Contini* and *Dominic Donato* for the respondent.

DECISION OF THE BOARD; December 18, 1986

1. These are three applications for certification made by the applicant, one of which may be described as an "industrial" application (Board File No. 2265-86-R), and the other two may be described as construction applications (Board File Nos. 2266-86-R and 2267-86-R).

2. When the hearing convened in this matter, counsel for the applicant advised the Board that it sought certification for a single all employee bargaining unit to include both the employees engaged in construction work away from the respondent's premises as well as the employees engaged in non-construction work at the respondent's factory.

3. After receiving the submissions of counsel, the Board recessed and then returned and delivered the following oral ruling:

These are three applications for certification in which the applicant seeks to represent all of the employees of the respondent. The respondent is engaged in the manufacture, sale and installation of wooden railings, primarily for new home construction. Almost 99 per cent of the respondent's product is installed in new homes by its own employees. The installation of those railings is, in our opinion, clearly work that comes within the definition of construction industry set out in section 1(1)(f) of the *Labour Relations Act* and the employees who perform that work are employees in the construction industry within the meaning of section 117(b) of the Act. While the respondent may be in the manufacturing business, it is also an employer in the construction industry when it is engaged in the installation of railings in new home construction, pursuant to section 117(c) of the Act.

Counsel for the applicant submits that one bargaining unit, comprised of both construction and non-construction employees is appropriate for collective bargaining. Alternatively, counsel submits that if we find a construction unit appropriate, then the shop employees are commonly associated with the on-site construction employees who install the railings. The respondent contends that there should be a separate shop bargaining unit and construction bargaining unit.

The respondent employs shop employees who are engaged in the manufacturing of the railings and also employs installers who perform the construc-

tion work. Some installers will, on occasion, perform shop work and some shop employees may occasionally be engaged in on-site work. There is common supervision among the employees, although the on-site employees generally work without direct supervision.

All employees, both shop and installation employees report for work at the respondent's premises to punch in and punch out. The installation employees drive to the job sites from the respondent's premises in the morning and return in the evening.

The Board's approach to bargaining unit determinations in this kind of situation was succinctly set out in *Dominion Paving Ltd.*, [1981] OLRB Rep. Oct. 1370 at 1371:

"In instances where an employer engages in both construction and non-construction activities, the Board's general practice is to group its employees into separate construction and non-construction bargaining units. However, where an employer engages in both construction and non-construction operations simultaneously *using the same work force*, the Board will on an application under the general provisions of the Act describe a bargaining unit which encompasses both operations."

[emphasis added]

In this case there is not a common work force. Ten of the respondent's employees do exclusively shop work and six employees do almost exclusively the on-site work. The metal bender, one of the six construction employees who was primarily involved in installation, also spends a minority of his total work time in the shop. The remaining four employees, one of whom is being trained for on-site work, spend the majority of their time in the shop, with a trainee metal bender spending more and more time in on-site work.

In our opinion, the employees engaged in the installation work are a discrete group of employees of the respondent who perform work in the construction industry. Those shop employees of the respondent who commonly perform installation work on site also come within the definition of employee in section 117(b) of the Act.

The employees who perform shop work only do not come within the definition of employee in section 117(b) since they are not commonly associated in work with the on-site employees.

Therefore, we find that the shop employees constitute an appropriate bargaining unit and the construction employees may constitute one or two appropriate bargaining units. The Board hereby leaves the preliminary determination of the precise description of the appropriate bargaining unit to the parties who can meet with a Labour Relations Officer to review the description as well as all other outstanding matters.

• • •

[Balance of decision omitted: Editor]

1635-85-R The Canadian Union of Public Employees, Applicant, v. **Metropolitan Separate School Board**, Respondent, v. Ontario Public Service Employees Union, Intervener #1, v. Ontario English Catholic Teachers Association, Intervener #2

Certification - Practice and Procedure - Reconsideration - Employer requesting Board reconsider its direction that employer provide copies of its employee lists to the union prior to the next hearing date - Whether labour relations officer need be present when union examines list

BEFORE: Owen V. Gray, Vice-Chairman, and Board Members W. H. Wightman and W. F. Ruth-erford.

DECISION OF THE BOARD; December 1, 1986

1. This certification application was filed October 2, 1985. The applicant union sought certification for a bargaining unit limited to "full-time" Heritage Language Instructors. The respondent contended that the bargaining unit would not be appropriate unless it consisted of all of its Heritage Language Instructors. On the first day of hearing, we expressed concern whether any unit limited just to Heritage Language Instructors was appropriate. After two subsequent days of hearing covering the contentions of the parties about Heritage Language Instructors and, at our request, evidence concerning the respondent's employment relations with all of its other unorganized employees, we reserved our decision on the composition of the appropriate bargaining unit. In a decision dated September 9, 1986 [[1986] OLRB Rep. Sept. 1259], we determined that the appropriate bargaining unit in this case is not as originally described in either the union's Application or the employer's Reply, but would include all instructors (that is, persons who teach but are not teachers as defined by the *Education Act*) regularly employed for more than ten hours per week.

2. Our finding with respect to the composition of the appropriate bargaining unit - that is, the description of the sorts of employees who are to be included in the unit - was not sufficient to dispose of this application. We still have to determine the identities of all persons who were actually employed in that unit as of the application date in order to then assess, from membership evidence filed, whether the percentage of those employees who were members of the applicant at the relevant time is sufficient, having regard to section 7 of the *Labour Relations Act*, to warrant either a representation vote or outright certification. The lists which had been prepared and filed by the employer and were examined by the union before our hearings began had dealt only with Heritage Language Instructors. As a starting point for identification of the persons employed in the unit we had since found appropriate, we needed new lists from the employer, naming the persons it claims were employed in that unit on the application date. Accordingly, in our decision of September 9th we ordered that the respondent prepare and file such lists prior to the continued hearing date, which was to be set by the Registrar.

3. As the bargaining unit we had found appropriate included persons in a range of job categories whom the union had not sought to organize, we thought it unlikely that the applicant could responsibly determine and state its position with respect to the accuracy of the employer's new lists on the continued hearing date without having some time prior to that date to study the new lists and make any necessary enquiries. Accordingly, in our decision of September 9th we ordered that the respondent deliver copies of these new lists to both the Board *and the union* within three weeks of that date or at least one week prior to the next hearing date, whichever was the earlier.

4. In the last paragraph of a letter to the Registrar dated October 1, 1986, counsel for the respondent said this:

I also note in paragraph 33 that the Board has directed M.S.S.B. to provide the lists of employees to the applicant trade union. This seems to run counter to the Board's normal practice with respect to employee lists and was not a matter that was raised before the Board during the hearing. Before our client is required to comply with that part of the Board's direction, I would appreciate an opportunity to address the Board on this point.

By letter dated October 3, 1986, the Registrar responded as follows:

With respect to the last paragraph of your letter, I am directed to ask whether you are requesting reconsideration of the Board's direction that copies of the lists be provided to the union before hearing. If you are, your attention is directed to Practice Note 17 ([1985] OLRB Reports March) and particularly paragraph 2, and you should file the material required by that paragraph within ten days. I am advised that any submissions with respect to reconsideration of the subject direction should address the Board's decision in *McDonnell-Ronald Limousine Service Limited*, [1985] OLRB Rep. Jan. 1, *Board of Education for the City of York*, [1985] OLRB Rep. May 757 and *Scarborough Board of Education*, [1986] OLRB Rep. Mar. 361 as well as the decision of the Nova Scotia Supreme Court in *Nova Scotia Michelin Employees' Local 1699 of the Canadian Labour Congress v. Nova Scotia Labour Relations Board et al.*, 86 CLLC ¶14,009.

5. By letter filed with the Board on October 16, 1986, counsel for the respondent requested that the Board reconsider its direction that the respondent provide copies of its new lists to the union prior to the next hearing date, which had by then been scheduled for October 24th. By decision dated October 17, 1986, we dismissed that request and directed that the Registrar forthwith dispatch to the union and its counsel copies of the new lists which the respondent had filed with the Board on October 8th.

6. The request for reconsideration began with this observation:

My client has, of course, no objection to the applicant examining the employee list at an appropriate point so that the applicant can determine whether it wishes to make any challenges to the list.

There can be no serious doubt that an applicant trade union has a legal right to examine the list of employees filed by the employer. An employer's contrary argument prompted a thorough examination of that question, and of the Board's practice with respect to disclosure of such lists, in the majority decision in *Airline Limousine*, [1985] OLRB Rep. Jan. 1 (reported as *McDonnell-Ronald Limousine Service Limited*, at 9 CLRBR (NS) 67 and 85 CLLC ¶16,018), which made the following observations:

12. On an application for certification, when any issue arises concerning the employee list or the composition of the bargaining unit, the Board's longstanding practice is to determine the bargaining unit description, then permit the applicant union to review the list so that it can identify and particularize any challenges. If the union does not request to see the list or question its accuracy, the Board will proceed on the basis of the information contained therein without the necessity of formal proof. But nothing in the Act or the Rules makes that employee list "confidential", nor is it easy to see where the Board would get the authority to withhold information upon which it planned to act, and which was so clearly necessary to its determination. The records of a trade union relating to membership have been accorded specific statutory treatment, as have other documents revealing employee wishes with respect to union representation. (See section 111 of the Act). Section 111 was passed to reverse judicial decisions requiring the production of such documents revealing employee preferences. (See: *Globe Printing Co. v. Toronto Newspaper Guild* [1951] O.R. 435; [1952] 2 D.L.R. 302; [1953] 3 D.L.R. 561.) Maintaining the confidentiality of a union's membership records helps to protect employees from unlawful reprisals by those employers who do not accept the legitimacy of their right to join a union or

engage in collective bargaining. However, there is no similar provision prohibiting or restricting disclosure of the list of employees said to be, or found to be, in the bargaining unit.

13. It is not difficult to understand why the employee list is revealed. It would be a little curious if a trade union were to be granted a certificate because it had established the requisite level of support in the bargaining unit described generally, but left the hearing without a precise understanding of the basis on which its application succeeded. On a more basic level, when even a simple certification case involves a comparison of the union's membership evidence with a list of employees in the bargaining unit, and there are statutorily prescribed consequences flowing from that calculation (a vote, outright certification, or dismissal), the union must be entitled to the employee list if it is to participate in the hearing in a meaningful way. How else can it properly protect and advance the rights of its members? How else can it determine whether the employee list is accurate and correct or whether through error, inadvertence, or improper intent the list of employees said to be in the bargaining unit is inaccurate? Now, of course, there may not be very many cases where an employer intentionally misrepresents the number of employees in the bargaining unit. But, as we have already noted, the speed with which the employer must respond to the certification application, the potential complexity of the issues, and the inevitable exercise of judgment will often result in the production of a list which, at least arguably, is not sufficient for the purpose of making the determinations required under sections 6 and 7 of the Act.

14. In our view, there is no sound basis for denying a trade union the opportunity to review the employee list and, in practice, the union has always been given that opportunity. If a question arises concerning the list the union has never been denied an opportunity to review it. Nor is there any good reason why it should not make a copy or take notes, so that it can pursue its inquiries, on its own time. We do not think that it makes sense to draw a distinction between *reviewing the list and taking a copy*, simply because the latter might assist a union in preparing its case or gathering information which could well result in a withdrawal of a challenge. It would be odd to structure a system in such a way as to reward union officials with a good memory, and multiply the difficulties in large bargaining units where there is the greatest potential for error or misjudgement; and we can only speculate about how a court would respond to this "hide and seek" approach to litigation, in which critical assertions of fact may be *revealed* or *reviewed*, but *not* copied, lest the party asserting those facts lose some tactical advantage attributable to the other's ignorance. Adversarial attitudes are prevalent enough in our collective bargaining system, without elevating them to the status of principles governing the process by which employees acquire the right to bargain collectively through a union of their choice. If, in the course of a certification application, a union is entitled to review the list - as we find that it is - it is our view that the union should be entitled to make a copy, and, again as a practical matter, a union has always been accorded the right to make a list of all unfamiliar names for the purpose of challenge and investigation.

In short, the Board is obliged by the rules of natural justice to provide an applicant union with access to the information in the employer's lists before it acts on that information in making any determination which affects or determines that union's rights. (See also *Extendicare Diagnostic Services*, [1981] OLRB Rep. Aug. 1134 at 8 and *Nova Scotia Michelin Tires Employees' Local 1699 v. Nova Scotia Labour Relations Board* 86 CLLC ¶14,009 (N.S.S.C.) at page 12,053.)

7. Having sensibly conceded the union's right to see the new lists it has filed, the respondent's request for reconsideration goes on:

In my submission, however, such examination should take place in the presence of a Labour Relations Officer for the reasons detailed by Board Member Ronson in his dissenting decision in *McDonnell-Ronald Limousine Service Limited* 85 CLLC page 14,120. At page 14,126, Mr. Ronson sets out the O.L.R.B.'s general policy, and the reasons therefor, with respect to the examination of employee lists in the following manner:

"1. I disagree with my colleagues. If the applicant wishes to examine lists of employee names then it should be done in the presence of a Labour Relations Officer. That is the *only* way that abuse of the Board's procedure can be prevented and is the *only*

way that employers can be assured that their lists will not be used by the union for organizing purposes.

2. The reasons for my dissent have been the reasons for the Board's policy concerning these lists since the creation of the Board. They remain as valid now, as they were then."

There have been only a few exceptions to the general policy, those exceptions being set out in the O.L.R.B. decisions mentioned in your letter of 3rd October, 1986.

Counsel goes on to submit that the majority decision in McDonnell-Ronald Limousine Service Limited, *supra*, which directed that the applicant trade union be given a copy of the lists, "turns very much on its own unique facts." He emphasises the complexity of the "list" issues in that case by contrast with a "simple certification application", which we take counsel to implicitly suggest that this case is. From these submissions we take it counsel would have us conclude that the majority in *Airline Limousine* would have adopted and approved the approach described in the dissenting member's decision had it been a simple case. We think not.

8. Originally, the practice or "policy" referred to in the dissenting opinion in *Airline Limousine* was related to another early practice, which was that the Board's own forces would always be deployed to investigate the accuracy of an employer's list whenever the union asked that it do so. This investigation was conducted by an "examiner", a position since supplanted by that of a "Labour Relations Officer." The linkage between the union's examination and the examiner's inquiry appears from the following extracts from *Gaytown Sportswear*, [1965] OLRB Rep. May 118 (in which an inquiry into the accuracy of the lists is referred to as an "inquiry into the composition of the bargaining unit"):

At the hearing of the application on April 23rd, the union challenged the accuracy of the respondent's claim that there were 43 persons in the bargaining unit. In this respect the applicant claimed that there were only 31 persons in the unit.

...

It has for some time past been the practice of this Board in such cases as the present, to authorize the examiner to inquire into the composition of the bargaining unit and not to impose any limitations on his authority in that respect. Moreover, the Board has not required the union to particularize its challenges at the hearing before it. The main reason for this practice is that the union usually does not have access to the employer's list of employees and is, therefore, not in a position to know or to particularize its challenges until it is made aware of the names and job classifications of the employees on the list at the examiner's hearing. Depending upon the nature of the challenges then made, many different issues of fact and law can and do arise, e.g., whether a certain employee was employed on the date of the application, his terms of absence and recall, whether he worked for the respondent employer or some other employer, whether he was a person exercising managerial functions, whether he worked in a particular location and thereby fell within the description of the unit, whether his duties and responsibilities were such as to bring him within an excluded category etc. Often, of course, new issues also arise during the course of the inquiry before the examiner from the answers given by the witnesses. It is obvious that any inquiry into the composition of a bargaining unit resulting from a challenge to the list is in many respects essentially of an exploratory nature from the point of view of the union.

The linkage is revealed again in *Livingston Wood Manufacturing Limited*, [1967] OLRB Rep. Feb. 877:

3. The applicant has referred to an alleged refusal by the respondent to provide it with a list of employees coming within the proposed bargaining unit. The Board's policy in this regard has been that during the course of the hearing before the examiner on the matter of the list of per-

sons within the bargaining unit the representative of the applicant is to be permitted to examine the examiner's list containing the names of the employees of the respondent within the proposed bargaining unit. At the conclusion of the hearing the list is to be retained by the examiner.

These decisions suggest that the Board normally withheld the lists from the union's scrutiny until after the union had challenged the list and requested that an examiner inquire into its accuracy. The "normal" approach was described differently, however, in *Dependable Caterers Limited*, [1961] OLRB March 457 at 459:

While normally, the applicant union does not obtain a copy of the respondent's list of employees, the Board's practice does afford an opportunity to a union which challenges it to check the list in the presence of the employer and a representative of the Board. If the applicant union is not satisfied with the contents of the list, it is entitled to make representations to the Board and to ask that an examiner be appointed to enquire into the composition of the bargaining unit or the duties and responsibilities of particular employees.

9. In any event, at a time when any list controversy invariably became the subject of an examiner's inquiry, the union's examination of the lists when the inquiry began was seen as the point at which the issues to be dealt with by the examiner were first delineated. The following passages from *Sudbury Memorial Hospital*, [1974] OLRB Rep. Dec. 871 illustrate that point:

2. On September 12th, 1974, the Board appointed an examiner to inquire into the composition of the bargaining unit and the lists of employees thereon. In due course the examiner convened a meeting of the parties and at the first meeting of the parties commenced the proceedings by showing the applicant the lists of employees in Schedules A, B, and D, filed by the respondent. The respondent objected to this manner of proceeding. That objection was overruled by the Examiner and the inquiry continued. Before dealing with the Report of the Examiner herein, we propose to comment on the objection by the respondent to that manner of proceeding. The actual objection of the respondent is that the examiner "without consultation with or agreement from the respondent and without specific instructions from the Board gave copies of Schedule A, B and D to the applicant union for their perusal and verification." ...

3. We fail to see why the procedure adopted by the Examiner in this matter is contrary to either established practices or contrary to the Act as suggested by the respondent. Indeed, the procedure adopted by the Examiner has been used for many years by the Board's examiners when certain areas of the lists of employees are in dispute. It is, of course, necessary for both sides to know the position of the other side before the actual issues in dispute before the Examiner can be delineated. Thus, *when the examiner shows the lists of employees in the various schedules to an applicant trade union, this is simply a method of conveying the respondent's position on the list of employees to the applicant trade union.* To suggest that this can be done in some other way is simply not practical. The objection of the respondent to the procedure adopted by the examiner is therefore denied.

[emphasis added]

10. Although the language of the dissenting opinion in *Airline Limousine* implies that the policy it refers to has been invariable in both content and application, that is not so. As appears from the decisions quoted above, older cases are not consistent about the precise stage of the proceedings at which the applicant was ordinarily given access to the information in the lists. While the decision in *Dependable Caterers Limited*, *supra*, said that the union would check the list in the presence of the employer's representative, the Board's later decision in *Extendicare Diagnostic Services*, *supra*, held that the union could review the lists in the absence of any employer representative. There is at least one reported decision from the 1960's in which, in circumstances different from those of this case, the Board directed that copies of employee lists be sent to an applicant union by mail together with a request that the union advise the Board whether it challenged the lists: *Paul Girard Co. Ltd.*, [1966] OLRB Rep. Sept. 411.

11. The dissenting opinion in *Airline Limousine* stated that an applicant's examination of the employee lists must take place in the presence of a Labour Relations Officer because this will prevent abuse of the Board's process and assure employers that their lists will not be used by the union for organizing purposes. The majority decision in that case addressed those points this way:

15. It might be said that providing the union with a list of employees gives it an advantage not only in the particular application under review, *but also in some later application*. It might be said that a union should not have the "tactical advantage" of knowing the parameters of the bargaining unit, or the identity of the employees in it, for the purposes of approaching them at some later time to see whether or not they wish to be represented by a trade union. The list might be "abused"; moreover, a calculating union might apply for certification simply to obtain the list for a *future* campaign. If an employer knew that a union would receive a copy of the employee list, the employer might be tempted not to respond to the certification application, or to make an incomplete response. Finally, it might be said that it is "unfair" that a union be permitted to know who the employees are, and the employer is not permitted to know precisely which of those employees have opted to support the union.

16. No doubt there is some basis for these concerns, but in our view they are overstated. First, from a practical point of view, some two-thirds of all bargaining units have less than forty employees so that a mere perusal will be sufficient to generate an accurate list. It is only in larger bargaining units where a copy of the list gives the union the opportunity for future advantage, but is precisely in those larger bargaining units that there is greater margin for error by one party or both, and a greater need for a list to identify and investigate the areas of dispute. Employers who believe they may benefit from filing an inaccurate or incomplete reply can do so now, and that fact in itself suggests that a union should have a copy of the list so it can evaluate its position. But the fact is that employers do not usually certify as accurate what they know is not, and unions do not usually file frivolous applications merely for discovery purposes. What does happen quite frequently are innocent errors by the employer, or an innocent miscalculation by the union as to the contours of the bargaining unit and the number of employees in it. Should the Board's process be abused, it has ample authority to deal with the problem.

We agree that the Board has ample authority to deal with any abuse of its process. Abuse of process can be prevented by making it clear that such authority will be exercised in an appropriate case. Hence, the presence of the Labour Relations Officer is not the only means of preventing abuse of a process which gives the union access to the employer's lists only for the purposes of the certification application in respect of which they are filed. Indeed, we are unable to understand or explain how the mere presence of a Labour Relations Officer during an examination of the lists could itself restrict the use thereafter made of the information thereby acquired. The presence of the Labour Relations Officer is not the only way to prevent abuse. Furthermore, it does not seem a particularly effective way to prevent abuse at all.

12. As we have already noted, the practice of having the union examine the lists in the presence of an examiner was a concomitant of the practice of invariably appointing an examiner to inquire generally into the accuracy of the list whenever the union asked that that be done, without having the union first identify its challenges or the basis for them. This approach created its own potential for abuse - one which the Board once treated as the inevitable consequence of its policy, as the follow passage from *Vail's Systems Company Limited*, [1966] OLRB Rep. Aug. 308 illustrates:

1. ...a number of meetings were convened by the Examiner and certain investigations carried out by him. The applicant has alleged that certain persons ought not to be included in the list of employees furnished by the respondent. The respondent now requests the Board to rule that the applicant must give particulars of these allegations.

2. In its application, the applicant stated that there were approximately 40 persons in the bargaining unit which it proposed. The respondent in the schedules to its reply listed the names of some 65 persons. The respondent has advised the Board that of 50 persons still employed by it

in the bargaining unit, the union has challenged 43. The applicant, we are advised, alleges that 20 of these persons exercise supervisory functions, that 17 were not in the employ of the respondent at the time of the application for certification, and that 6 do not perform work within the bargaining unit. It may be observed that by this reckoning the applicant's own estimate of the number of persons in the bargaining unit was grossly in error.

3. The Board is concerned that its processes and the rights of all parties not be abused by the making of allegations without foundation. *Where, however, a claim is made that the list of employees is not correct, the Board has no alternative but to conduct its usual inquiry through an Examiner as has been done in the instant case.* Where the Examiner has, as in the instant case, investigated the records of the employer, the applicant should be entitled to present evidence to contradict that which the Examiner has examined. In the instant case the Board directs that the Examiner call for examination those persons whose names appear on the list of employees furnished by the respondent and who the applicant claims were not in the employ of the respondent on the date of the making of the application. In these proceedings, examination and cross-examination shall be limited to the issue whether these persons were in the employ of the respondent on the date of the making of the application.

[emphasis added]

It must be observed that the practice described in *Gaytown Sportswear, supra*, and other decisions encouraged the making of allegations without regard to the firmness of their foundations, because it was only by making unparticularized challenges to the employer's position on this relevant issue that the union could get particulars of the employer's position.

13. Practices and policies of the Board have changed since the creation of the Board. The position of examiner has evolved into that of the Labour Relations Officer, which has a greatly expanded role in promoting of settlement of matters before the Board, including matters arising in the many new areas of jurisdiction which have been conferred on the Board since the 1960's. While an examiner's report on an inquiry once consisted of the examiner's personal summary of the *viva voce* evidence heard, a Labour Relations Officer's report on an inquiry now includes a full transcript of all *viva voce* evidence received on the matters in dispute, without comment or summary by the officer. To that extent, at least, the inquiry process has become more cumbersome and less expeditious. The Board's approach to the processing of certification applications has also changed. The Board's attempts to resolve an application now commence before any formal hearing begins. If an application is not disposed of through the new (relative to the date of the Board's creation) pre-hearing "waiver program" described in the Board's Practice Note No. 12, then (ordinarily) a Labour Relations Officer is assigned to and does meet with the parties on the morning of the scheduled hearing date, without there having been any formal Board order authorizing the officer to make any particular inquiry and before any formal hearing begins. The officer's role at this stage is purely consultative and mediative. If the parties reach agreement on a description of the appropriate bargaining unit, as they often do, the officer then permits the union to review the employee lists. By contrast with the Board's earlier practice, the union is then expected to be ready to particularize its challenges and articulate the basis for them as best it can when the matter proceeds to hearing, which will ordinarily occur, if at all, later that same day. Similarly, the employer is then expected to articulate the basis for its position on those aspects of the list which have been identified as contentious during this pre-hearing meeting with the officer. When the matter does come on for hearing later in the day, the Board may call on a party to justify any request that an officer be appointed to conduct an inquiry by articulating the facts which the party says would be revealed by such an inquiry. When an officer is to be appointed, the Board has been increasingly concerned that the subject matter and scope of the inquiry be defined and delineated as far in advance as possible and with all possible particularity. Indeed, the Board has the same concern about the issues which may remain to be dealt with in its own hearings.

14. There are always limitations on the extent to which issues in a certification application can be defined in advance of hearing. In the case of disputes over the identify of persons employed in the appropriate unit at the relevant time, the possibility of defining or even ascertaining the positions of the parties on the hearing date is greatly limited by the fact that the union ordinarily has no notice of the employer's position before the hearing date. There is only so much an applicant union can do to define and narrow the issues in a matter of minutes after learning what they are. Even if the union comes fully prepared for any eventuality – able to particularize its challenges and even address them with evidence available to be called that day – proceedings may still be delayed by the employer's inability to respond to challenges asserted at hearing. That problem occurred in *Martin Muhr Investments Inc.*, (Board File No. 0236-86-R, unreported decision dated May 16, 1986), for example, where a union's detailed challenges to a list it first saw that day could not be dealt with because counsel for the employer was not prepared to do so and was unable to contact anyone who could instruct him on the employer's answer to the union's allegations. There the Board noted:

In his own defense, counsel [for the respondent] observed that he had not known before the date of the hearing that there was any challenge to the list. While we do not accede to the applicant's request that we make a critical note about the respondent's inability to get instructions with respect to the applicant's challenges, we do note (as we did in the course of the hearing) that this difficulty would have been avoided had the respondent's lists been provided to the applicant in advance of the hearing, so that it could, in turn, review those lists and give the respondent advance notice of the challenges it proposed to make.

This was by no means the first time that the Board has commented on the adverse effect on the Board's processes of the current delays in informing an applicant union of the employer's position on the list; for another example, see *Oaklands Regional Centre*, [1984] OLRB Rep. June 855 at 10.

15. While the four cases referred to in the Registrar's letter may or may not be the only recent reported decisions in which list disclosure was a point of contention, they are certainly not the only ones in which a trade union has been given a copy of an employee list or seen one in the absence of a Labour Relations Officer. Employers and employer counsel unfamiliar with Board practices often seem surprised when a Labour Relations Officer offers or is offered to supervise the union's review of what could only be described in any other forum as a pleading. Counsel and employers familiar with the historic practice have dispensed with it when its observance would delay matters.

16. Because applicant unions (and interested employees) do not ordinarily see the respondent employer's lists before the first hearing date, scheduled hearing time and the time of other parties and potential witnesses is regularly and systematically wasted on the first scheduled hearing date, while the union and anyone else with an interest in the issue do what they could have done more effectively before the hearing: review the list and make whatever inquiries are necessary to take a considered position on the accuracy of the list. Often there is not time to make the necessary inquiries, so the union simply challenges every name about which it is uncertain; the hearing is then adjourned and a fresh hearing date is set or an officer is appointed to make inquiries, in either event introducing delays and adding cost which might both have been reduced or eliminated had the union been given both the opportunity and the obligation to review the lists in advance of the scheduled hearing date. When a panel has become seized, the inability to make effective use of scheduled hearing time is even more critical, because of the increased difficulty of rescheduling a hearing before any particular panel at an early date.

17. Both before and since the creation of this Board, the general trend in the courts and other adjudicative tribunals has been toward adopting practices and procedures which encourage or force early and complete pre-hearing disclosure of each party's case to the opposite parties, so

as to promote the settlement or narrowing of the issues to be tried, to enhance the quality of preparation and, hence, presentation of the evidence and argument on issues which remain to be tried and to achieve, by these and other means, a more efficient and effective use of the public resources devoted to dispute resolution. It should come as no surprise to anyone that the same trends should occur in the evolution of this Board's practices and policies. Those practices and policies are subject to critical examination from time to time, as they must be, in light of experience, the level of the Board's resources and the competing demands made on those resources. Any change in or departure from existing practice which would facilitate and encourage a narrowing of issues and better preparation for hearing by the parties without any significant increase in demand on Board resources is a change or departure which will attract the Board's serious consideration. Any contention that such a change should not be made for fear that the new procedure may be abused must be closely scrutinized, along with the implicit notion that the current procedure effectively prevents otherwise likely abuses and does not itself harbour the potential for abuse.

18. We need not decide in this case whether this Board should adopt, as several other Canadian jurisdictions have, the practice of sending copies, or requiring the employer send copies, of employee lists to the union prior to the first scheduled hearing date. The considerations which might support such a change have been recited here to show why a simple invocation of Board practice without reference to any concerns grounded in the particular circumstances of this case was not found a compelling reason to delay giving notice to the union of the case to which it must respond until a Board employee is available to supervise the reading of something the union is entitled by law to read. In any event, there can be no doubt after *Airline Limousine Service Limited*, *supra*, that the proper approach to the timing and manner of disclosure of employee lists is open to consideration on a case by case basis. We were of the view when we gave our direction that it was appropriate for the reasons noted in paragraph 3 hereof. We remained of that view after considering the respondent's reconsideration request. Accordingly, we dismissed the respondent's application for reconsideration as we have noted in paragraph 5 hereof. As will be apparent, we made that decision in the interest of expediting these proceedings, having concluded it was unnecessary to direct that a Labour Relations Officer participate in the union's review of the new lists before the scheduled continuation date.

1343-86-OH John O'Neill, Complainant, v. David Williams, Audrey Michell and The North Halton Association for the Mentally Retarded, Respondents

Health and Safety - Whether supervisor having status to bring complaint under s.24 of OHSA - Complaint dismissed for failure to provide adequate particulars

BEFORE: *Patricia Hughes*, Vice-Chairman, and Board Members *D. H. Blair* and *W. F. Rutherford*.

APPEARANCES: *L. H. Rosen*, *R. W. Kuszelewski* and *John O'Neill* for the complainant; *J. A. Roffey* and *D. Williams* for the respondents.

DECISION OF THE BOARD; November 28, 1986

1. This is an application under section 24 of the *Occupational Health and Safety Act* ("the

Act”) in which John O’Neill contends he was dismissed by the North Halton Association for the Mentally Retarded (“the Association”) because he tried to enforce the Act.

2. The hearing into this matter began on October 14, 1986. At that time (reflecting its Reply), the Association raised three preliminary objections to our hearing this case: it submits that “supervisors” are excluded from the remedial provisions of the Act and thus O’Neill does not have status to bring an application under section 24 of the Act; it argues that we should dismiss the application on the basis of timeliness; and it requests that we dismiss the application for failure to provide particulars under section 72 of the Board’s Rules of Procedure.

3. We first heard submissions with respect to the contention that supervisors do not have status to bring an application under the Act. Counsel for the Association depended on the wording of the Act, including the definition of “supervisor”, “worker” and “trade union”, the inclusion of “person” in certain provisions, the reference to “a worker” in certain provisions and on the allocation to supervisors and workers of different responsibilities and obligations under the Act to support her contention that supervisors do not have status under section 24. She argued that if “worker” includes “supervisor”, supervisors could claim worker status and avoid obligations under the Act. Furthermore, there was nothing unusual in a supervisor not having the same remedies as a worker. She stated that there was no jurisprudence on this issue, but referred us to *Tecumseh Products of Canada, Limited*, [1985] OLRB Rep. Jan. 123 in which this argument had been raised. However, the Board did not decide that issue because it dismissed the complaint on the basis of delay. We considered the submissions of counsel and were not persuaded that they lead to the conclusion that supervisors do not have status. Furthermore, in our view, it is more consistent with the intent of the legislation that supervisors have the opportunity to make applications under section 24 than that they do not. We accordingly ruled orally that Mr. O’Neill, whether or not a supervisor, has status to bring a complaint under section 24 of the Act. (Mr. O’Neill’s representative took the position that Mr. O’Neill was not a supervisor because he could not hire or fire; he appeared not to understand that at this point, that was not the issue before us. We note that the definition of “supervisor” does not make reference to hiring and firing and believe it inappropriate to import definitions developed under the *Labour Relations Act* into terminology under the *Occupational Health and Safety Act*, as we were urged to do by Mr. O’Neill’s representative, except as specified under the legislation. In light of our decision on this point, we did not hear evidence with respect to whether Mr. O’Neill was in fact a supervisor within the meaning of the *Occupational Health and Safety Act*.)

4. We now set out more fully the reasons for our conclusion that supervisors have status to make complaint under section 24 of the Act.

5. Under section 1.26 of the Act, “supervisor” is defined as “a person who has charge of a work place or authority over a worker”. Section 1.29 defines “worker” as “a person who performs work or supplies services for monetary compensation”. A supervisor does perform work or supplies services for monetary compensation. Thus, while the language could have been clearer, (for example, the phrase “authority over other workers” might have been used in section 1.26), in our view, supervisors are subsumed under the category “worker”. The definition of “trade union” under section 1.27 “includes an organization representing workers or persons to whom this Act applies where such organization has exclusive bargaining rights under any other Act in respect of such workers or persons”. More generally, it is defined by reference to the definition of trade union under the *Labour Relations Act*. It does not have to represent all persons to whom the Act applies and therefore the fact that a union may not represent supervisors does not mean that for purposes of occupational health and safety, a supervisor may not also be a worker.

6. Supervisors and workers are given different responsibilities under the Act. Thus when a worker is also a supervisor, his or her duties are set out under section 16. Non-supervisory workers are subject to the duties enumerated in section 17.

7. Certain sections refer to "person". Where these terms are used, they may refer to persons who are at the work place, but do not have worker status, supervisory or non-supervisory. For example, section 25(1) refers to "a person [who] is killed or critically injured from any cause at a work place". Such persons do not have a remedy under section 24 of the Act. Only workers, supervisory or non-supervisory, have status under section 24. However, such persons may contravene the Act and be subject to the penalties under section 37 (for example, section 25(2) states that "no person" shall "interfere with, disturb, destroy, alter or carry away any wreckage, article or thing at the scene of or connected with the occurrence").

8. In our view, the wording of the Act can be reasonably interpreted to give supervisors a right to a remedy under section 24 of the Act. This interpretation is more consistent with the policy considerations underlying the Act than the exclusion of supervisors would be. We can conceive of no justification for not giving supervisors the right to refuse to work where working conditions are unsafe. We therefore confirm our oral decision in this matter.

9. Mr. O'Neill was fired on February 4, 1986 and filed this complaint on July 31, 1986. The Association contends that this delay of approximately six months is excessive and warrants dismissal of the complaint. We did hear evidence with respect to why Mr. O'Neill did not file his complaint until July 31, 1986. However, in light of the decision we reach below on the failure to file particulars, it is not necessary for us to rule on the issue of delay and we do not do so.

10. The respondent wrote to Mr. O'Neill on September 10, 1986, requesting particulars of his complaint. Although Mr. O'Neill had in fact sent a letter to the respondent indicating his view that the respondent knew all the facts, expressing a concern that the respondent was trying to "trick [him] into making a procedural error", but also stating that he would "rehearse" the respondent if necessary, the respondent had not received it by the date of the first hearing. We gave the complainant and his representative some time to discuss with the respondent the matter of particulars and to provide them during the first day of hearing. This exercise proved to be totally futile. The complainant's representative did not appear to understand what was expected in the way of particulars. Accordingly, we gave the complainant until October 21, 1986 (a date agreed to by the parties) to provide the respondent with particulars as follows:

the specific dates on which he had raised safety matters; the specific matters involved; the specific individuals with whom these matters were raised; the specific provisions of the Act which he claims he was trying to enforce.

We emphasised to the complainant that our role was not to determine whether the employer had contravened the *Occupational Health and Safety Act*, but to determine whether the complainant had been terminated for attempting to enforce compliance with the Act. We informed the complainant that he would be permitted to provide particulars only with respect to the two specific issues which he had raised in his complaint. These were stated in the complaint to be as follows:

- 1) On or about October, 1985 the Complainant sought to improve the safety arrangements of the vans transporting clients.
- 2) On or about January, 1986 the Complainant sought to enforce engineering controls standards regarding the toxic fumes from the shrink wrap operation including those set out in section 145 of Regulation 692 under the *Occupational Health and Safety Act*.

11. A second day of hearing (October 31, 1986) had been scheduled for cross-examination on the matter of delay. Mr. O'Neill had filed within the time provided a document purported to be the particulars ordered by the Board. However, the document referred to sections of the Act and of Regulation 692 having no relevance whatsoever to the complainant's original allegations and did not appear to contain reference to provisions which did relate to those allegations (except section 145 of Regulation 692). Mr. O'Neill had a new representative at this time and he acknowledged that these "particulars" would not be of assistance to the respondent. It would not have been inappropriate to have dismissed the complaint at this time, since Mr. O'Neill had failed to provide the particulars ordered by the Board and requested by the respondent on September 10, 1986. However, we gave the complainant and his new representative a period of time during the hearing to set out the particulars relating to the specific allegations in the complaint, in accordance with our oral order of October 14, 1986. The material produced by the complainant did not satisfy the Board's order to provide particulars pursuant to section 72 of the Board's Rules. We were not prepared to afford Mr. O'Neill any more time to refine this "material" and accordingly, we orally dismissed the complaint for failure to provide adequate particulars under section 72 of the Board's Rules.

12. Counsel for the respondent asked for costs for the first day of hearing since a period of time had been required to deal with the matter of particulars which the respondent had requested on September 10, 1986. We decline to deviate from the Board's normal practice of not awarding costs, particularly since the respondent was unsuccessful in its objection to our proceeding on the basis that supervisors do not have status under section 24 of the Act.

13. Our oral dismissal of this complaint is hereby confirmed.

1977-85-U Labourers' International Union of North America, Local 183, Complainant, v. Olympia & York Developments Limited, c.o.b. as Olympia Floor & Wall Tile Co., and Joe Schochet, Respondents

Discharge for Union Activity - Unfair Labour Practice - Chief union organizer discharged on day of certification hearing - Organizer terminated solely for his threatening behaviour and racist remarks - Complaint dismissed

BEFORE: Judge R. S. Abella, Chairman, and Board Members J. A. Ronson and S. O'Flynn.

APPEARANCES: L. A. Richmond, M. O'Brien and M. Kevins for the complainant; John C. Murray and J. Schochet for the respondents.

DECISION OF THE BOARD; December 4, 1986

1. The complainant union alleges that the respondent violated sections 64, 66 and 70 of the *Labour Relations Act* by firing Michael Kevins for union activities. The respondent denies the allegations and claims that Kevins was fired for his threats of violence and anti-semitic remarks in the course of the organizing campaign.

2. The hearing lasted several days. Five witnesses were called, four by the respondent and one, Kevins, on behalf of the complainant. As in most cases of this nature, much turns on a ques-

tion of credibility. Having observed the witnesses carefully and upon reviewing the evidence, we find the respondents' evidence to be more credible than that of the applicant, whose evidence through Kevins we found to be inconsistent and unreliable.

3. The application for certification was received and the Notice to Employees was posted by the respondent on October 15, 1985. The terminal date was October 22, 1985. On Friday, November 1, 1985, Joe Schochet, a Vice-President of the respondent, attended at the Ontario Labour Relations Board for the certification hearing and, based primarily on the information he learned that day, made the decision to fire Kevins. In the afternoon of November 1, 1985, Schochet gave instructions that Kevins' employment be terminated forthwith.

4. On the way to the Ontario Labour Relations Board hearing on November 1st, Schochet learned from Nick Biliias, an employee subpoenaed to the certification hearing by the company, that Kevins had told another employee, Gary Lochhead, that anyone who signed both a union membership card and the petition opposing the union would get "hooked". Biliias explained to Schochet that "hooked" was a boxing term for punching. Schochet immediately drove back to the plant to speak to Lochhead. Lochhead confirmed the contents of the discussion and advised Schochet that threats were also made to another employee. In addition, he told Schochet that Kevins had made anti-semitic remarks during the organizing campaign.

5. The day before the hearing, Biliias had also told Schochet that the major theme of the organizing campaign was "to get the Jews". Biliias said comments attributed by employees to Kevins during the campaign included "the fucking Jews", "we got the fucking Jews by the balls", and "we've got to get the fucking Jews". All these comments were confirmed by Lochhead.

6. When Schochet attended at the Board hearing, he met two employees who, from October 18th until the terminal date, had circulated a petition opposing the certification drive. These employees, Joseph Sapirman and Michall Prokopets, told Schochet of their encounters with Kevins during the organizing campaign. The essence of what they told him is set out below.

7. Sapirman, a 17 year old employee who had been with the company for two months prior to the certification drive, was approached on October 15th by Kevins with whom he had previously had a casual and not unfriendly acquaintanceship. Kevins accused him of being a spy because he was Jewish, and told Sapirman that if he wanted to prove he was not a spy, he should sign for the union. According to Sapirman, Kevins' tone was forceful and threatening. He was both surprised and hurt by the comments and was so frightened by them that he stayed away from work the next day.

8. Sapirman knew that Kevins' nickname at work was "The Animal" and therefore worried about Kevins' remarks to him. He contacted a lawyer and got legal advice. Eventually he decided to start a petition opposing the union.

9. On October 18th, Kevins approached Sapirman and said "There's a Jew named Jacob Fine trying to break up the union. If he comes over to you, come tell me". Sapirman was "shocked" by the remark. Fine was a Vice-President of the respondent, a friend of his father's, and the man through whom he got his job.

10. Later the same morning, Sapirman enlisted Prokopets to assist him in circulating the petition. They were standing near one of the warehouse entrances at an intersection when Sapirman saw Kevins coming towards him at a high speed and in reverse on a fork-lift truck. Sapirman stood frozen in fear and with no place to move, as he watched Kevins stare at him and drive the

truck towards him. The truck stopped abruptly about a foot away from Sapirman. Kevins took the petition from Sapirman and marked "F.U." on a signature line.

11. As a result of these events, and because swastikas appeared on the door of and inside the men's washroom at the plant, Sapirman and Prokopets went to the police to try to lay charges, but were told they had insufficient grounds to lay a complaint. On October 23rd, Sapirman requested a transfer out of his area because he was afraid for his safety. The reason he gave for the request was merely "personal reasons". Until he told Schochet at the November 1st Ontario Labour Relations Board hearing about the events, he never discussed the threats or anti-semitism with anyone at the warehouse except Prokopets. He did, however, file a complaint with the Ontario Labour Relations Board against Kevins and others dealing with the threats (Board File No. 1898-85-U).

12. Prokopets had been an employee of the company for 8 years. He confirmed for Schochet at the November 1st hearing what Sapirman had said about the fork-lift incident and how frightened he was. He told Schochet he thought he was "finished". Prokopets also told Schochet that on October 21st, Kevins drove towards him on a fork-lift truck brandishing a large piece of wood in what Prokopets felt was a threatening gesture. He expressed to Schochet his concern for his safety and reinforced it by mentioning an anonymous call he received at home during the organizing campaign from someone threatening to "break his head open" if he kept collecting signatures. Prokopets told Schochet he thought the caller was Kevins but he was not certain. Until November 1st, he complained to no one in management about the incidents.

13. Presented with what he called "a mosaic" from Sapirman, Bilias, Prokopets and Lochhead, Schochet concluded that the theme of the certification drive organized by Kevins was "Let's get the fucking Jews". The combination of Kevins' threats of violence and his anti-semitic remarks, both of which Schochet found "reprehensible and disgusting", made Schochet decide to terminate him. On November 1st he told the union's counsel and the union representative at the Board hearing what he intended to do and why.

14. After the hearing, Schochet returned to the warehouse and spoke to another employee, Richard Kaminski. Schochet asked him if he had heard anything from Kevins about the union, company and Jews. Kaminsky told Schochet that when Kevins initially approached him about joining the union, Kaminski expressed concerns that a strike would result in replacement workers. Kevins replied that no one would be getting in, even if he had to "bust heads". Kaminsky also told Schochet that after Sapirman had started circulating the petition, Kevins had asked him for the last names and addresses of Sapirman, Prokopets and Fine but would not say why he wanted the information. Kaminsky refused to give more than the last names because he assumed from Kevins' tone that he wanted to go to their houses and beat them up. He was also concerned, he stated, because of Kevins' nicknames "The Animal" and "The Werewolf".

15. As for the anti-semitic remarks, Kaminsky told Schochet that Kevins had said to him "Fucking Jews" and "Get the Jews by the balls" in the course of the organizing campaign. Kaminsky said he assumed Kevins was talking about the Reichmanns who, he said, most people knew were the company's owners and were Jewish.

16. Schochet made his final decision to terminate Kevins after his conversation with Kaminsky. He left instructions that when Kevins arrived for work on Monday, he should be told that he was terminated and could come and speak to Schochet about it if he so wished.

17. Kevins did not come to see Schochet Monday, but called him at home later that evening. They made arrangements to meet the next morning in Schochet's office. The next morning,

Kevins asked Schochet in his office for his pay and separation slip. Kevins did not ask why he was fired nor did Schochet tell him. Schochet assumed, since he had told the union's lawyer and staff representative why he would be firing Kevins, that Kevins knew the reasons from them. Moreover, he stated that even if Kevins had denied the allegations, based on the conversations with the five employees he spoke to - Biliias, Lochhead, Kaminsky, Sapirman and Prokopets - he would have fired him anyway.

18. Schochet stated that he was aware of the probability that Kevins would bring a complaint to the Board over his termination, but felt that the corroboration of five employees presented "overwhelming" evidence of the threats of violence and anti-semitism, conduct he considered "hooliganism" and could not tolerate. He stated categorically that Kevins' termination had nothing to do with his union activity. Schochet had extensive and a largely positive relationship with the union he regularly dealt with on behalf of the company in Quebec and had never before experienced the anti-semitism Kevins freely expressed.

19. Kevins had been an employee of the respondent since December 1984. His work performance was adequate and he received two raises in his first year. There is no doubt that he was the chief union organizer. He organized the certification drive because of certain monetary and personnel grievances with the company, concerns he expressed to Schochet over a privately arranged lunch on October 27th, 1985. He admitted in evidence that he referred to "fucking Jews" but claimed it was not meant as racist, but was simply a way of referring to management. Kevins stated that he did not feel the term was derogatory or offensive, and would never use it around people who would have thought it offensive. He stated, for example, that he would never say it to Schochet because he would be afraid of, and indeed expect a termination of his employment for saying it. Kevins said he was hot-tempered and had a short-fuse and a bad mouth, but that the language was "common for guys my age" and was the way he has always communicated. When he said "We've got the fucking Jews by the balls", he stated that he meant the union had enough cards to get certified. When he accused Sapirman of spying because he was Jewish, he said he knew Sapirman was Jewish but was "thrown for a loop" by the petition and his "head was spinning" in anger. He denies that he threatened Sapirman with the fork-lift truck or Prokopets with the piece of wood.

20. Counsel referred us to the following cases which we reviewed: *DeVilbiss (Canada) Limited*, [1975] OLRB Rep. Sept. 678; *Hallowell House Limited*, [1980] OLRB Rep. Jan. 35; *Honest Ed's Limited*, [1985] OLRB Rep. Nov. 1609; *The Ontario Educational Communications Authority*, [1976] OLRB Rep. Nov. 721; *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299; *J. Pascal Inc.*, [1985] OLRB Rep. July 1075; *Du Pont of Canada Limited*, [1961] OLRB Rep. Jan. 360; *International Wallcoverings*, [1983] OLRB Rep. Aug. 1316; *FAG Bearings Limited*, [1978] OLRB Rep. Jan. 76; *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254; *Whitby Boat Works Limited*, [1968] OLRB Rep. Apr. 96; *Himmelman v. King's-Edgehill School*, 7 C.C.E.L. 16 (N.S.T.D.); *John T. Hepburn Ltd.*, [1985] OLRB Rep. Jan. 75; and *Cadillac Fairview Corp. Ltd.*, [1982] OLRB Rep. Sept. 1262.

21. The issue before us is whether the termination of Kevins was motivated solely by what Schochet learned about Kevins' conduct or whether it was motivated even in part by the fact that Kevins was the key union organizer or indeed for any anti-union reasons. We are satisfied on the totality of the evidence that the termination was based solely on what Schochet had learned from five employees about Kevins' threatening and anti-semitic behaviour. Schochet's evidence, which we found to be entirely credible, was that he was extremely disturbed by the danger to the workplace from the potential violence and the articulated racism. We have no difficulty in accepting Schochet's explanation that he was attempting to protect his workforce from threats of violence

and intolerable anti-semitism and that Kevins' status as a union organizer played no part in his decision. We are satisfied that Schochet, as soon as he became aware of Kevins' actions and words, and had an opportunity to investigate and verify them, made the decision to terminate only on those bases and for the purpose of protecting the workplace from such flagrant misconduct.

22. On the basis of the evidence before us and for all the foregoing reasons, we are satisfied that the respondent employer has discharged its burden of proof under section 89(5) of the Act by establishing that Kevins was terminated solely for his threatening behaviour and racist remarks and that his union activity formed no part of the basis for his discharge. The complaint is therefore dismissed.

2232-86-R Ontario Public School Teachers' Federation, Applicant, v. The Ottawa Board of Education, Respondent

Practice and Procedure - Pre-hearing Vote - Party requesting pre-hearing representation vote by mail must provide reasons - Board suggesting guidelines to determine question of the number, location, and hours of operation of polls for vote of occasional teachers

BEFORE: *Owen V. Gray*, Vice-Chairman, and Board Members *I. M. Stamp* and *C. A. Ballentine*.

DECISION OF THE BOARD; December 10, 1986

1. This is an application for certification.
 2. The applicant has requested that a pre-hearing representation vote be taken.
 3. It appears to the Board on an examination of the records of the applicant and the records of the respondent that not less than thirty-five percent of the employees of the respondent in the voting constituency hereinafter described were members of the applicant at the time the application was made.
 4. Having regard to the agreement of the parties, the Board directs that a pre-hearing representation vote be taken of the employees of the respondent in the following voting constituency:

all occasional teachers employed by the respondent in its elementary panel in the City of Ottawa, save and except employees in bargaining units for which any trade union held bargaining rights as of November 4, 1986.
- For the purpose of clarity, the term "occasional teacher" in this description of the voting constituency has the meaning assigned to it by clause 1(1)31 of the *Education Act*, R.S.O. 1980, c. 129, as amended, and an employee who does not have the qualifications of a "teacher" as defined by clause 1(1)66 of that Act does not fall within that description.
5. All employees of the respondent in the voting constituency on the 24th day of November, 1986, who have neither voluntarily terminated their employment nor been discharged for cause between the 24th day of November, 1986, and the date the vote is taken will be eligible to vote.

6. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

7. When the parties met with the Labour Relations Officer ("LRO") appointed in this matter pursuant to the usual order, the respondent asked that any pre-hearing representation vote herein be conducted by "Mail In Vote". The LRO suggested that the respondent reduce its submissions on this point to writing and forthwith file them with the Board. In its consequent letter to the Board dated December 2, 1986, the respondent says that at the aforesaid meeting the LRO

"indicated that it was no longer the policy of the Labour Board to entertain applications for Mail In Votes and that any request by the Ottawa Board would surely be rejected. If it is possible to have a Mail In Vote this would still be preferred."

It is not the policy of the Board that it will not entertain requests that a representation vote be conducted by mail. The LRO's invitation to file submissions was inconsistent with her having said there is such a policy. We assume that the respondent misunderstood what was said. What the LRO would have said is that it is no longer the Board's policy to conduct pre-hearing representation votes by mail-in ballot as a matter of course in applications involving occasional teachers. The reasons for that change were explained in the Board's decision in *Halton Roman Catholic Separate School Board*, [1986] OLRB Rep. July 962.

8. In that decision, the Board concluded that the admittedly significant differences between occasional teacher employment and employment in other bargaining units with which this Board deals did not preclude the Board's conducting representation votes at polling stations as it ordinarily does, nor, indeed, did they favour use of a mail-in ballot over the usual procedure. As the Board noted with respect to other sorts of employees who are not at work on a daily basis: "an otherwise unnecessary trip to their work place is not thought to be too much effort to expect from employees who wish to have their wishes taken into account in representation matters." The Board went on:

14. As counsel notes, occasional teachers ordinarily have several potential work places. Presumably, a central location (or locations) can be identified such that the effort required to travel to it (or one of them) is not substantially different from the effort which might be involved in travelling to work on a teaching assignment. Apart from the fact that there are more of them as a percentage of the total, those occasional teachers not actually at work at such a central location are in no different position from that of employees in other contexts who are not at work on the day of a vote, with this exception: some of them may have occasional teaching assignments at locations other than the central location which might prevent them from attending a poll conducted during their working hours. This problem, too, occurs in other contexts - with truck drivers, for example, and other employees whose work duties take them away from the otherwise logical polling place during working hours. The answer in those circumstances has been to ensure that the polls are open at times outside those work hours, so that employees in that position may also attend and cast their ballots.

15. It seems to us that resort to something resembling the Board's ordinary vote procedure need not require that polls be conducted in every school, nor would that disenfranchise individuals who could be described as actively interested in employment as an occasional teacher, if polls are open both during and outside the ordinary hours of work of occasional teachers. It would, however, require of nearly all eligible voters that they make an effort roughly equivalent to the effort involved in attending at work, in order to cast a ballot.

The Board concluded:

Unless specifically addressed in the decision directing the vote, the method of voting in cases involving occasional teachers should be a matter for the Registrar. The Board's policy that

notice of the vote be given by mail to eligible voters and that the names and addresses of those voters be given to the applicant are unaffected by this decision.

9. In the face of the Board's decision in *Halton Roman Catholic Separate School Board, supra*, a party who asks that a pre-hearing representation vote be conducted by mail must offer some reason why, in the circumstances of its case, the Board or the Registrar should depart from the usual practice. The respondent's letter offers no reasons for its request. In connection with the question of the number of polling stations which would be required if its request were rejected, the respondent observed that:

... a large number of occasional teachers working in Ottawa live outside the City and are required to travel long distances. This includes teachers from Quebec as well as the cities of Gloucester, Nepean, Orleans, Oxford Station, Kanata, Manotick, etc. Some teachers travel upwards of 40 kilometers to reach their supply teaching assignments. Furthermore, as this is casual employment, many teachers use public transportation or car pools. We believe it is unreasonable to require these teachers to travel significantly out of their way in order to reach a polling station. Therefore, the Ottawa Board felt that in establishing the number of polling stations, a minimum of nine would be required ...

The letter goes on to suggest nine schools as locations for polling stations. According to the LRO's report on her meeting with the parties, the applicant has said that three polling stations would be sufficient.

10. The number, location and hours of operation of polling stations are normally matters which are referred to the Registrar for determination. The above-quoted passages from the Board's decision in *Halton Roman Catholic Separate School Board, supra*, suggest certain guidelines for the determination of these questions when the voting constituency consists of occasional teachers. These are:

- 1) The number and location of polling stations should be sufficient to ensure that the average voter who is actively interested in employment as an occasional teacher need not travel significantly farther to vote than he or she could reasonably be expected to travel to take up an occasional teaching assignment.
- 2) The hours of operation of polls should be set so that voters who may be engaged on occasional teaching assignments on the day of the vote at schools where polls are *not* located have a reasonable period of time outside teaching hours during which to travel to a poll and cast their ballots.

We see no reason to direct that the pre-hearing representation vote herein be conducted by mail, and no reason to address ourselves to the question of the number, location and hours of operation of polls. Those and all other matters relating to the taking of the representation vote are referred to the Registrar pursuant to Rule 68 of the Board's Rules of Procedure for determination by him in accordance with his usual practice and the guidelines referred to in the previous paragraph.

0466-84-M The Bricklayers, Masons Independent Union of Canada, Local 1, Applicant, v. The Masonry Contractors' Association of Toronto Inc. and **Parent Masonry Limited**, Respondents

Construction Industry Grievance - Employer and MCAT bound by two collective agreements with applicant union - Employer violating collective agreements by failing to remit dues, welfare payments, etc. - Collective agreements containing guarantee by MCAT on all monetary provisions - Guarantee not enforceable - Union failing to exhaust other remedies against employer

BEFORE: *R. A. Furness*, Vice-Chairman, and Board Members *H. Kobryn* and *W. H. Wightman*.

APPEARANCES: *Maureen Farson* and *John Meiorin* for the applicant; *David R. Rothwell*, *Joe De Caria* and *William Jahn* for The Masonry Contractors' Association of Toronto Inc.; no one for Parent Masonry Limited.

DECISION OF THE BOARD; December 19, 1986

1. The applicant has referred a grievance concerning the interpretation, application, administration or alleged violation of two collective agreements to the Board for final and binding determination.

2. The applicant requested leave of the Board to amend the style of cause by adding "Early Spring Investments Limited" as a respondent in this reference. After considering the representations before it, the Board ruled that it would give the applicant the option of either (a) proceeding against the two named respondents (because the Board would not add "Early Spring Investments Limited" as a respondent without notice of this reference from the Board) or (b) seeking an adjournment so that the applicant might make a written request to add "Early Spring Investments Limited" as a party respondent. The applicant elected to proceed without adding "Early Spring Investments Limited" as a party respondent.

3. There was no dispute that Parent Masonry Limited ("Parent") and The Masonry Contractors' Association of Toronto Inc. (the "Association") are bound by two collective agreements with the applicant. The collective agreements became effective on May 31, 1982, and remained in effect until May 31, 1984. One collective agreement covered bricklayers, stonemasons and their apprentices. The other collective agreement covered bricklayers' assistants.

4. In February of 1984, the applicant grieved that Parent had failed:

- (a) to remit welfare payments and welfare reports to the applicant from May 1983 to February 1984 and ongoing in contravention of article 24 of the collective agreements;
- (b) to remit union dues and assessments with a list of the names and amounts corresponding to those dues and assessments from May 1983 to February 1984 and ongoing in contravention of article 25 of the collective agreements;
- (c) to pay the additional charges required under article 26 of the collective agreements in respect of untimely payments of union dues and welfare payments from May 1983 to February 1984 and ongoing;

- (d) to pay travelling time in accordance with article 14 of the collective agreements to employees working in Zone 2 from July 1983 to September 1983, inclusively;
- (e) to make time cards and records of hours worked for each employee available to the applicant pursuant to article 5B of the collective agreements; and
- (f) to pay employees properly and to make proper welfare and union dues checkoff payments in violation of articles 9, 10, 14, 18, 24 and 25 of the collective agreements.

5. Articles 5B, 9, 10, 14, 18, 24, 25, 26 and 28 of the collective agreements state:

- 5. B) Each Contractor shall furnish his employees with a time card and record the hours worked by each employee and after payment the Employer will keep such records at least a period of twenty four months in accordance with Section 11 of the Ontario Employment Standards Act. Such records shall be made available to the Union if a dispute arises.

9. PAYMENT OF WAGES

- A) Pay period shall not exceed 7 calendar days. All wages shall be paid during working hours.
- B) When paid by cheque, the employee shall receive same not later than 4:00 p.m. on Thursday.
- C) When paid by cash, payment made no later than 4:00 p.m. Friday.

10. HOLIDAYS AND VACATION WITH PAY

- A) Vacation pay shall be paid at the rate of 10% of gross wages earned.
- B) All vacation pay is to be paid in the month of July as prescribed by Federal and Provincial regulations, except those cases regulated by Article #18.

14. TRAVELLING EXPENSES

For the purpose of travelling expenses, all the area of Ontario is to be divided in three zones.

- A) Zone 1: The City of Toronto to the boundary line mentioned on Zone 2 below, no travelling expenses.
- B) Zone 2: \$12.00 per day is to be paid out beyond the east boundaries of Highway 12 at the Lakeshore then North to the Town of Myrtle, then west to the Township of Claremont and Stouffville then continuing further west to the Township of Oak Ridges using the King Side Road as a boundary line to the Town of Bolton, then in a southerly direction to the Township of Victoria then Georgetown and Spyside to Milton, then using Highway #25 as the westerly boundary line follow that boundary in a southerly direction to the Lakeshore. To and using the outer boundaries of the connecting Highways in a direct line of Hamilton, Guelph, Barrie, Lindsay and Oshawa. Where a zone boundary line passes through a built up area, the outer limits of the built up area shall be deemed to be within the zone.

- C) Zone 3: All the area beyond Zone #2, the travel expenses shall be paid at \$25.00 per day.

D) TRAVELLING TIME WILL BE PAID WEEKLY, PROVIDED:

- 1) The designated crew must be able to function.
- 2) The crew must remain on job site until 11:00 a.m.
- 3) Contractor or foreman has the option to send a crew home before 11:00 a.m. due to inclement weather.

18. LAY-OFF NOTICE AND QUITTING

A) One hour's advance notice shall be given and paid for whenever men are dismissed. Termination of employment shall take place at the end of the regular working day, except for incompetency. Employees will be permitted to leave the job one-half hour after notice is given, in order that they may catch street cars or buses before the rush hour on account of the difficulty of carrying their tools on crowded cars and buses.

B) Wages receivable shall be paid within 24 hours. Unemployment Insurance Separation Certificate and Vacation Pay not given to the employee at the time of severance shall be sent by registered mail within 72 hours.

C) Any employee who voluntarily leaves his employment shall have his wages, Unemployment Insurance Separation Certificate and Vacation Pay by the next regular pay day.

24. WELFARE

The parties hereto agree that the Welfare Plan presently in existence shall continue. The amount of monies to be paid by the Employers into the Welfare Fund shall be 95¢ per hour earned for each Journeymen, Bricklayer and Stonemason employee (Bricklayer Assistant Employee) covered by the bargaining unit. The Welfare Report and remittance shall be paid on or before the 15th of the month following that month for which contributions are earned.

The Union shall have the option to apply portions of wages of this agreement to implement and extend the members' benefits and will notify the Employers to make such deductions and remit such amounts as are required in accordance with this agreement. Upon the exercise of the option by the Union, the wage rates will be automatically amended accordingly.

25. CHECK-OFF

A) The Employers shall deduct from the pay of each employee covered by this agreement, from the first pay of each month, such Union dues and assessments as established by the Union and shall remit same with a list stating therein names and amounts from whom deductions were made and shall forward same to the Secretary Treasurer of the Union not later than the 15th of that month, this not to include collections of arrears of Union dues.

B) The Employers agree to require all present employees to become members of the Union in the following manner:

- 1) Each Employer shall supply the Union with a list of the names of his employees within ten (10) days of the signing of this agreement.
- 2) The Union shall return the list of employees to the Employer

noting therein those employees who are not members of the Union.

- 3) The Employers shall require that each employee who is not a member of the Union shall become a member within forty-eight (48) hours, upon receipt of the returned list.

C) Whenever any member of the Employers has no Bricklayers in its employ, the Union must be notified in writing of such before the 15th of each month as long as this condition may exist.

26. PENALTIES

A) Any Employer which fails to remit monies required in accordance with Article 24 (Welfare) and Article 25 (Check-Off) by the 15th of the month will be assessed a charge of 1% on the money owing. If any such Employer has failed to make the same remittances by the end of the month in which they became due, an additional charge of 2% of the monies owing will be assessed.

B) If after exhausting the grievance procedure, and [sic] Arbitration Board has issued a decision making a finding of a violation of Articles 8, 9, 10, 14, 24, 25A of this agreement, the violating party shall be liable to pay a penalty of \$500.00 to the other party as well as a further penalty of 10% of any monies owing by that party to the other party.

28. GUARANTEE

Monetary guarantee by the Employers to the Union on all monetary Articles and Clauses of this collective agreement excluding Article #26, Penalties Clause A & B.

A) The Masonry Contractors' Association of Toronto on behalf of all its members will guarantee up to a maximum cumulative amount of Thirty Thousand Dollars (\$30,000.00) on all monetary parts of this collective agreement between the parties being the Wages, Vacation Pay, Welfare Trust Fund remittances, Union Check-Off and Travel Expenses and will pay such amounts to Local #1 only when the parties hereto have exhausted all ways and means of collecting same including the procedures as explained in grievance and arbitration procedures in this collective agreement against a member of the Association who is in default in complying with the monetary terms of collective agreement obligations to his employees.

B) The above mentioned (M.C.A.T. \$30,000.00 guarantee) will not apply when Local #1 requests payment on monetary terms of contract agreement when a member is delinquent beyond the terms of the contract agreement.

6. Although Parent did not appear at the hearing, it stated in paragraphs 6 and 7 of its reply:

6. The replies given to the grievance, if any:

The respondent Parent Masonry Limited did advise the Applicant that payment of sums due could not in the summer of 1983 be made, but would be forthcoming. From August, 1983 the Respondent Parent Masonry Limited suffered critical financial difficulties culminating in its cessation of operations in early February of 1984. Statements made by the Respondent Parent Masonry Limited to the Applicant were made honestly and in good faith and without any intent to defraud, deceive or interfere with the rights of the Applicant or any of its members. The respondent Parent Masonry Limited has no assets, is not operating and has no income.

7. The respondent makes the following submissions:

(The respondent's defence to the arbitration, including all objections to the arbitrability should be set out in this paragraph.) (attach additional sheets if necessary).

- (a) The applicant has failed to communicate the total or particulars of the monetary defaults alleged;
- (b) See paragraph 6 above.

7. The Association in paragraph 7 of its reply stated:

7. The respondent makes the following submissions:

(The respondent's defence to the arbitration, including all objections to the arbitrability should be set out in this paragraph.) (attach additional sheets if necessary.)

- (a) The applicant has failed to seek the assistance or intervention of the respondent MCAT;
- (b) The applicant has apparently failed to pursue the remedies available to it and its members in the circumstances;
- (c) The applicant has failed to communicate the total or the particulars of the monetary defaults alleged;
- (d) In any event, the applicant is not entitled to enforce the penalties referred to in excess of compensation to be proven.

8. Parent did not appear at the hearing. Having regard to the evidence before it, the Board finds that Parent has violated the collective agreements as alleged by the applicant, namely, articles 9, 10, 14, 18, 24 and 25. The Board therefore directs Parent Masonry Limited:

- (a) to remit welfare payments and welfare reports to the applicant from May 1983 to February 1984 and ongoing in accordance with article 24 of the collective agreements;
- (b) to remit union dues and assessments with a list of the names and amounts corresponding to those dues and assessments from May 1983 to February 1984 and ongoing in accordance with article 25 of the collective agreements;
- (c) to pay the additional charges required under article 26 of the collective agreements in respect of untimely payments of union dues and welfare payments from May 1983 to February 1984 and ongoing;
- (d) to pay travelling time in accordance with article 14 of the collective agreements to employees working in Zone 2 from July 1983 to September 1983, inclusively;
- (e) to make time cards and records of hours worked for each employee available to the applicant pursuant to article 5B of the collective agreements; and
- (f) to pay employees properly and to make proper welfare and union dues checkoff payments in violation of articles 9, 10, 14, 18, 24 and 25 of the collective agreements.

9. Having regard to the evidence before it, the Board finds and accordingly directs Parent Masonry Limited to pay to The Bricklayers, Masons Independent Union of Canada Local 1 the sum of \$33,673.64 with respect to the violations of the collective agreement covering bricklayers and stonemasons and the sum of \$21,955.99 with respect to the violations of the collective agreement covering bricklayers' assistants.

10. It appears to the Board that the applicant has distinct claims against the Association in view of the clear wording of the guarantee in article 28 of each collective agreement. The wording is unambiguous in its application of the guarantee to each collective agreement. Article 28 contains the heading "Monetary guarantee by the Employers to the Union on all monetary articles and clauses of *this collective agreement*...." [emphasis added]. Part A of article 28 states that the Association "will guarantee up to a maximum cumulative amount of \$30,000.00 on all monetary parts of *this collective agreement*" [emphasis added]. Under Part A of article 28 the guarantee operates "only when the parties have exhausted *all ways and means of collecting same including the procedures as explained in grievance and arbitration procedures in this collective agreement* against a member of the Association who is in default in complying with the monetary terms of collective agreement obligations to his employees" [emphasis added]. The guarantee is found separately in each collective agreement. The Association argued that the true intent of the parties was to limit the maximum cumulative guaranteed amount to \$30,000.00 for each member company. The Association further argued that the evidence of the witnesses and the use of the word "cumulative" in article 28 supports this conclusion.

11. In our view, there is no ambiguity in the meaning of the guarantee such as to justify reliance on extrinsic evidence as to the intentions of the parties to the collective agreements. The guarantee is clearly referable to the monetary portions of each collective agreement with the member company whether or not more than one collective agreement is in existence between the parties. In our opinion, there is no language in the collective agreements which would limit the amount payable for each company. The word "cumulative" does not have this effect. Where "cumulative" is used, the limitation is placed at "a maximum cumulative amount of thirty thousand dollars (\$30,000.00) on all monetary parts of this collective agreement...". The word "cumulative" refers to the sum of \$30,000.00 and is not qualified by additional language. The parties to the collective agreements have not inserted any limiting language although they could easily have done so had they wished. The emphasis in the guarantee by repetition of the words "this collective agreement" indicates that the collective agreement forms the parameters of this obligation. Therefore, two guarantees, each in a separate collective agreement, give rise to the possibility of two separate claims which may involve the Association in a maximum cumulative liability of \$60,000.00.

12. Article 28 is qualified by the words "all ways and means". The grievance and arbitration procedures are clearly included in "all ways and means" and it is clear that "all ways and means" extends beyond the grievance and arbitration procedures. The use of "all" and the plural "ways and means" indicate that more than one method was contemplated by the parties to the collective agreements. By implication, the exhaustion of the grievance and arbitration procedures is only part of the obligation embraced by the phrase "all ways and means".

13. It is appropriate to consider the nature of a guarantee and the obligations which arise under it. Properly speaking, a guarantee is a promise to answer for the debt, default or miscarriage of another person. See *13 C.E.D. (Ont. 3rd) ¶2 p. 51, Duncan, Fox & Co. v. North & South Wales Bank* (1880), 6 App. Cas. 1 at p. 11 and *Forster v. Ivey* (1901), 2 O.L.R. 480. In view of the onerous nature of an obligation undertaken by a guarantor, a strict construction of a guarantor's obligation is justified. The rule is that a guarantor's liability is limited to the terms of his contract and that the contract must be strictly construed. See *Lloyd's v. Harper* (1880) 15 Ch.D. 290. The

process of collective bargaining by the parties in Ontario is based upon the concept of voluntarism and the parties may include anything in their collective agreements which is not contrary to law. There is no justification here, as was argued by the applicant, for limiting the obligation of the applicant to grievance and arbitration by special concerns of labour relations. The guarantee provisions in article 28 are highly unusual and where the condition precedent is broadly worded there is no reason to believe that the parties intended to narrow the application of the condition precedent. In our view, the phrase "all ways and means" ought to be fairly construed as "all ways and means of collection available at law to the parties".

14. However, because of the *Rights of Labour Act*, R.S.O. 1980, c.456, the remedies available to a trade union for the enforcement of obligations under a collective agreement are limited at law to grievance and arbitration under the *Labour Relations Act* (and collection measures flowing therefrom when such an award is filed with the court), and remedies which by statute are explicitly available in respect of trade unions and obligations under collective agreements. The procedure in the *Mechanics Lien Act*, R.S.O. 1980, c.261 (now the *Construction Lien Act*, S.O. 1980, c.6) falls into the latter category because the filing of a lien does not involve court action, is available in respect of wages owed under a collective agreement and is assignable by the individual workman to his trade union representative. The inclusion of a mechanics lien in "all ways and means" is consistent with the commercial realities in the construction industry. The existence of the lien remedy is known to the parties. Indeed, the applicant was certainly familiar with and employed the lien remedy against another employer as well as endeavouring to use the same remedy against Parent. In *Citadel Assurance Co. v. Johns-Manville Canada Inc.* [1983] 1 S.C.R. 513, the Court implied that either a written or implied obligation to exhaust all remedies before the creditor could collect on a guarantee, would reasonably include the mechanics lien remedy where the parties were engaged in the construction industry. At common law the creditor was not required to exhaust all remedies against the debtor before demanding payment from the guarantor. However, the creditor was required to safeguard all security which on the debtors default might be available to the guarantor. See *Snell's Principles of Equity*, 28th ed. p.466. It is not clear whether the opportunity to take out a mechanics lien can be characterized as a security for these purposes. The Supreme Court in *Citadel General Assurance Co. v. Johns-Manville Canada Inc.*, *supra*, described the proposition as "not free from doubt". The Court was, however, clearly of the view that an implied term obliging the claimant "to exhaust all other remedies before claiming under the bond" would include the obligation to take out a mechanics lien. In the instant case, the obligation is explicit in the guarantee. In our opinion, the parties intended to use the words "all ways and means" to expand on the creditor's obligations at common law so as to remove any doubt from the obligation to take out a lien.

15. At what point is the applicant entitled to seek the assistance of the Association? By the terms of article 28, the Association is required to pay upon the performance of a number of conditions precedent, that is to say, a) when a member "is in default in complying with the monetary terms of collective agreement obligations to his employees"; b) when "the parties hereto have exhausted all ways and means of collecting" the amount owed; and c) specifically where the grievance procedure has been exhausted. Since the obligation of attempting collection is on the "parties hereto", it appears that the applicant is entitled to seek the assistance of the Association at some point after the default has occurred but before the Association is called upon to indemnify the applicant. That is to say, the obligation to exhaust "all ways and means" is one which is mutually agreed to by the applicant and the Association as guarantor. The Association neither knew, nor reasonably could have been expected to know, of Parent's default unless or until so informed by the applicant. In these circumstances, the Association could not intervene until informed of the default by the applicant. The evidence clearly establishes that John Meiorin, the secretary-treasurer of the applicant, knew several months before it informed the Association of the continuing

default by Parent of its obligations under the collective agreements. Mr. Meiorin, no doubt motivated by considerations of kindness, in his judgement permitted Parent to try and arrange mortgage financing and other financial assistance in order to preserve the financial integrity of Parent. However, at this time Parent was clearly in default of its obligations under the collective agreements and Mr. Meiorin, in his judgement, permitted these events to get out of hand and critically delayed enforcing rights in the form of mechanics liens or of instituting grievance and arbitration procedures under the collective agreements. In our judgement, it was not until it was far too late that Mr. Meiorin on behalf of the applicant informed the Association of the default of Parent. By this time it was far too late for the Association to monitor and protect its guarantee under the collective agreements. Since the Association's obligations to the applicant only became operative on the condition precedent that all ways and means of collection, including grievance arbitration, be exhausted, the Association had no rights which might have been asserted against Parent until such time as the condition precedent was performed. It appears that the reason the joint obligation of exhausting remedies is placed on the "parties" rather than the applicant, is to allow the Association the opportunity to monitor the applicant's collection efforts to ensure the Association's equitable rights against Parent were not jeopardized by the loss of security through delay or neglect.

16. In addition to the arguments discussed above, the Association denied liability because it said that the applicant effectively lost the benefit of the lien remedy through delay attributable through negligence or lack of good faith. The guarantee requires all remedies to be exhausted, and the remedy not pursued in a timely, diligent, good faith manner cannot be said to be "exhausted". The applicant cannot contract out of its own negligence without clear words to that effect. Accordingly, a condition precedent to the Association's liability has not been met. The argument here is essentially one of construction, the construction that would give reasonable efficacy to the terms agreed upon in the collective agreements. The condition precedent to the Association's liability is a course of action by the applicant, not of inaction. It would be absurd to allow the applicant to avoid its obligations under the guarantee simply by its delay and default. The very purpose of the condition precedent is to circumvent the common-law right of the applicant to seek relief against the Association without pursuing any remedies against Parent. The condition precedent thus must be construed with the protection of the guarantor in mind. At common law, the party may not contract out of its own negligence without clear words of necessary implication: see *Gertsen et al., v. Municipality of Metropolitan Toronto, et al.* (1974) 2 O.R. (2d) 1. To construe the condition precedent in such a way as to allow the applicant to act in an untimely fashion would have the effect of excusing it for its own negligence.

17. For the foregoing reasons, this reference succeeds against Parent and is dismissed as against the Association.

1206-86-U Carmelo Pelleriti, Complainant, v. Hotel and Restaurant Employees' and Bartenders' International Union, Respondent, v. Cara Operations Limited, Intervener, v. Ministry of Labour, Intervener

Duty of Fair Representation - Evidence - Unfair Labour Practice - Discharged employee with limited English signed letter of resignation at meeting with grievance settlement officer - Union acted arbitrarily by not ensuring that employee understood what he was signing - Grievance settlement officer not compellable and settlement efforts privileged based on common law

BEFORE: *Judge R. S. Abella*, Chairman.

APPEARANCES: *K. S. Chatarpaul* and *Charinee Abeysekera* for the complainant; *Richard Stephenson* for the respondent; *Brian O'Byrne* and *Wanda Paszkowski* for Cara Operations Limited; *Donald Chiasson* for the Ministry of Labour.

DECISION OF THE BOARD; December 22, 1986

1. This is a complaint by Carmelo Pelleriti that the respondent union violated section 68 of the *Labour Relations Act*.

2. The complainant, at the time of his termination, had been an employee of Cara Operations Limited for 17 years. He was first employed as a kitchen helper but for the past 10 years was working as a cook.

3. On March 25, 1985 at the end of an extended night shift, he was stopped by the police in the company parking lot and was arrested because a box of shrimp belonging to the company was found in his car. Pelleriti called his supervisor the next morning and was told he was suspended for stealing from the company. As a result, he went to the union office to speak to the union representative, Gerry Jones. Jones filled out a grievance form for Pelleriti's suspension.

4. On March 26th, Pelleriti received a letter from the company advising him that as a result of what the police found in his car, his employment was terminated.

5. On March 29th, Pelleriti attended at the company offices with Jones, a shop steward, and two company representatives. Jones was told by the company representatives at this meeting that the reason Pelleriti was terminated was because of the theft. At the conclusion of this meeting, Jones told Pelleriti they would go to arbitration.

6. On April 18th, Jones called Pelleriti to tell him there was to be a meeting the next day. Jones did not tell Pelleriti what the meeting was about or who would be present, but Pelleriti was under the impression, based on his previous conversation with Jones, that it was an arbitration meeting. He did not know it was a settlement meeting. In fact, the meeting was with a Grievance Settlement Officer of the Ministry of Labour's Office of Arbitration.

7. The meeting took place on the company's premises. Pelleriti was in the meeting room with Jones, Ida Banton who was a shop steward, and Banton's then 3 year old daughter. Banton was not at the meeting to represent Pelleriti but was there for her own case. She remained only because Jones had asked her to stay and she gave evidence that she had no prior knowledge of Pelleriti's case.

8. The Grievance Settlement Officer was William Davis. He was subpoenaed by the union

to give evidence in these proceedings. He attended with his counsel but ultimately objected to giving evidence on the grounds of privilege. The Board ruled orally that the Grievance Settlement Officer was not compellable and that these settlement efforts were in fact privileged based on Wigmore's principles and the rationale in the Supreme Court of Canada case of *Slavutych v. Baker et al*, [1976] 1 S.C.R. 254 at 260. Wigmore's principles state:

"(1) The communications must originate in confidence that they will not be disclosed.

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.

(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation."

In this case, we are satisfied that Davis' evidence is privileged on the grounds that this is a process the parties engage in on the understanding that it will be confidential. Although there is no specific legislative protection for Grievance Settlement Officers, one may look to the statutory protection given by section 111(4) and (5) of the *Labour Relations Act* for support for the theory that this is a confidential relationship to which a privilege ought to attach. The case of *Shakotko v. Shakotko and Williamson* (1976) 27 R.F.L. 1 (Ont. C. of A.) also shows, by analogy, the willingness of the courts to develop for settlement officers such a privilege not otherwise protected by statute.

9. The meeting with Davis involved a process whereby Davis spoke to Pelleriti, left him alone with Jones and Banton while he spoke in another room with company representatives, then returned to suggest in very strong terms that Pelleriti accept the termination by resigning and accepting the company's offer of a standard letter of reference. Davis told Pelleriti he was "dead, finished" because of the evidence he learned that the company had.

10. Pelleriti was very confused. He denied the theft and waited for Jones to give him advice. Jones gave him none, and in fact admitted in evidence that Pelleriti seemed to have trouble understanding what was going on. Jones also admitted that he kept telling Pelleriti that it was up to him. Banton's evidence was that she did not know what was going on and was distracted by having to attend to her young daughter. She confirmed that Jones did not advise Pelleriti or even talk to him about the case.

11. Eventually, Pelleriti signed a form containing his resignation and the company's agreement to sign a letter of reference. Neither Jones nor Banton explained it to him. He asked for a copy but did not receive one until after his case was completed in criminal court.

12. Pelleriti speaks a very halting English. He was assisted throughout these Board proceedings by an interpreter. He claims not to have understood that he was resigning permanently. It was his understanding that what was reached was a tentative settlement whereby he would not work for Cara until the court case was over, but would receive a letter from them so he could find other interim employment. In fact, he was unable to find alternate employment until April, 1986.

13. On September 4, 1985, Pelleriti was acquitted of the criminal charges. The next day, he went to the union office because Jones had told him to wait until the criminal case was over. He made inquiries about getting his job back, but the union officer who called the company representative about the matter was told the matter was closed because Pelleriti had resigned. The union official then checked the file, found the document containing the settlement, and gave Pelleriti a

copy. It was the first time anyone had given Pelleriti a copy of this document. As a result of this information, Pelleriti went to a lawyer and eventually instituted these proceedings.

14. It is clear from the evidence that throughout the settlement meeting with Davis, Pelleriti kept asserting his innocence. Jones in his evidence admitted this, confirmed that Pelleriti kept asking for his job back, and that he had difficulty understanding Davis. There is no doubt that Pelleriti was confused about the process on April 19th, that he did not appreciate the implications of it, and that he certainly did not realize that he was signing a permanent resignation. Nonetheless, in the absence of any advice from the union, he signed because he thought whatever he was signing would get him other employment until his criminal case was over. He did not understand that arbitration was an option in the event that the meeting with Davis was unsuccessful.

15. In the Board's view, the union behaved arbitrarily at the April 19th settlement meeting in a number of ways. Through Jones, it failed to direct its mind to the particular grievance and represent Pelleriti in a fair way. To Pelleriti, a 17 year employee, the matter of a termination was critical and should have been taken more seriously by Jones. It was Jones' duty clearly to ensure, given Pelleriti's limited English, that he understood the implications of what he was signing, and in particular, to explain to him that he had the option of *not* signing and going instead to arbitration. Jones ought to have prepared Pelleriti for the April 19th meeting by explaining to him what it was for, and how it would proceed. As far as Pelleriti knew, he was at an arbitration hearing and had little choice but to sign the settlement offer Davis had secured from the company. He did not appreciate or fully understand the implications of what he was signing. In its totality, Jones conduct towards this long-term employee who had received the ultimate employer sanction was cavalier in its disregard of Pelleriti's rights of fair representation.

16. In all the circumstances, therefore, the Board finds the union's conduct to have been arbitrary and in violation of section 68 of the Act. The Registrar is therefore directed to list this matter for a hearing to receive the parties' submissions as to an appropriate remedy if and when the Registrar is notified by one of the parties that they have been unable to agree on a remedy.

2170-86-R; 2171-86-R; 2222-86-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, (CAW-Canada), Applicant, v. **Plastics CMP Limited**, Respondent, v. Cement, Lime, Gypsum & Allied Workers, A Division of International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO-CLC, Intervener; National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, (CAW-Canada), Applicant, v. **Kawartha Moulding Limited**, Respondent, v. Cement, Lime, Gypsum & Allied Workers, A Division of International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO-CLC, Intervener; National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, (CAW-Canada), Applicant, v. **Peterborough Plastic Painters Limited**, Respondent, v. Cement, Lime, Gypsum & Allied Workers, A Division of International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO-CLC, Intervener

Bargaining Unit - Pre-hearing Vote - Related Employer - Articles of Amalgamation indicating the three respondents had amalgamated - Declaration of related employer unnecessary - Respondents each having a collective agreement with the incumbent union - Determination of voting constituencies for pre-hearing vote - Whether ballot boxes should be sealed

BEFORE: *Owen V. Gray*, Vice-Chairman, and Board Members *I. M. Stamp* and *C. A. Ballentine*.

DECISION OF THE BOARD; December 3, 1986

1. These are applications for certification in which the applicant has requested that the Board conduct a pre-hearing representation vote. The applications in Board Files 2170-86-R and 2171-86-R were filed on October 28, 1986. The application in Board File 2222-86-R was filed on November 3, 1986.

2. The application in Board File 2170-86-R describes the appropriate bargaining unit as follows:

all employees of the respondent at Peterborough, Ontario, save and except foremen, supervisors, persons above the rank of foreman and supervisor, office and sales staff and students employed during their school vacation.

It is acknowledged that there was a collective agreement between Plastics CMP Limited and the intervener covering the period October 1, 1984 to October 31, 1986. One of the parties has filed a document purporting to be a copy of that agreement. The recognition clause in that agreement reads as follows:

ARTICLE 3 RECOGNITION

3:01 The Company recognizes the Union as the sole and exclusive bargaining agent of all employees in the Bargaining Unit of the said Company, and shall apply to all production employees on Plastics C.M.P. payroll in Peterborough, save and except foremen and persons above the rank of foreman, office and sales staff, and chemists.

3. In its application in Board File 2171-86-R, the applicant describes the appropriate unit as:

all employees of the respondent at its plant in Peterborough, Ontario, save and except foremen, supervisors, persons above the rank of foreman and supervisor, office, sales, quality control department, persons regularly working for not more than twenty-four hours per week and students employed during school vacation.

It is conceded that Kawartha Moulding Limited and the intervener were parties to a collective agreement covering the period October 1, 1984 to October 31, 1986. One of the parties has filed what purports to be a copy of that collective agreement. The recognition clause in that agreement reads as follows:

ARTICLE 3 RECOGNITION

3.01 the Company recognizes the Union as the sole and exclusive bargaining agent of all employees in the bargaining unit of Kawartha Mouldings Limited, 400 Plastics Road, Peterborough, Ontario, save and except foremen and supervisors, persons above the rank of foreman and supervisor, office, sales, quality control department, persons regularly working not more than twenty-four (24) hours per week, and students employed during the school vacation period.

4. In its application in Board File 2222-86-R, the applicant describes the appropriate bargaining unit as follows:

all employees of the respondent in Peterborough, Ontario, save and except foremen, supervisors, all persons above the rank of foreman and supervisor, office and sales staff.

It is conceded that Peterborough Plastic Painters Limited and the intervener were parties to a collective agreement covering the period June 10, 1985 to January 1, 1987. One of the parties has filed what purports to be a copy of that collective agreement. The recognition clause in that document reads as follows:

ARTICLE 3 RECOGNITION

3.01 The Company recognizes the Union as the sole and exclusive bargaining agent of all employees in the Bargaining Unit of the said Company, and shall apply to all production and maintenance employees working in the employment of Peterborough Plastic Painters Limited in the City of Peterborough, save and except foremen, supervisors, office and sales staff.

5. In each application, the applicant has alleged that Plastics CMP Limited, Kawartha Moulding Limited and Peterborough Plastic Painters Limited "are associated or related activities or businesses within the meaning of section 1(4) of the *Labour Relations Act* and constitute a single employer for the purposes of the Act." In each case, the applicant asks that the Board "apply section 1(4) to this application for certification and ... issue an appropriate declaration under section 1(4)." In its reply filed in each of the three applications, Plastics CMP Limited has responded to that claim by saying that it is the correct respondent in each case and that the applicant is entitled to the relief claimed under subsection 1(4) because Plastics CMP Limited, Peterborough Plastic Painters Limited and Kawartha Moulding Limited were amalgamated on January 2, 1986 and continue under the name of Plastics CMP Limited. Following the meeting of the parties referred to later in this decision, counsel for Plastics CMP Limited filed a photocopy of that corporation's Articles of Amalgamation, the original of which appears to bear the certificate of the appropriate government official indicating that those Articles became effective on January 2, 1986 with respect to the amalgamation of Plastics CMP Limited, Peterborough Plastic Painters Limited and Kawartha Moulding Limited under the *Business Corporations Act*, 1982, S.O. 1982 c. 4. Section 178 of that statute provides, in part:

178. Upon the articles of amalgamation becoming effective,

- (a) the amalgamating corporations are amalgamated and continue as one corporation under the terms and conditions prescribed in the amalgamation agreement;
- (b) *the amalgamated corporation* possesses all the property, rights, privileges and franchises and *is subject to* all liabilities, including civil, criminal and quasi-criminal, and *all contracts*, disabilities and debts *of each of the amalgamating corporations*;

• • •

[emphasis added]

Unless there is some question of the authenticity or effectiveness of these Articles of Amalgamation, it appears that a declaration under subsection 1(4) would be entirely unnecessary. The three corporations in question have become one corporation and, hence, one employer, for all purposes including the purposes of the *Labour Relations Act*. Unless either of the other parties to these proceedings advises the Board that it takes issue with the authenticity or effectiveness of the Articles

of Amalgamation or with the legal conclusion we have drawn on the basis of section 178(b) of the *Business Corporations Act, 1982*, it does not appear necessary for the Board to entertain the application under subsection 1(4) of the *Labour Relations Act* (hereafter "the Act").

6. In each of its applications, the applicant says that if the application under subsection 1(4) of the Act is granted, the appropriate bargaining unit in these applications ought to be a single unit encompassing the three bargaining units contained in the aforesaid collective agreements plus lab technicians not presently represented by the incumbent, or any trade union.

7. A Labour Relations Officer was appointed in each of these three applications to meet with representatives of the parties for the usual purposes in connection with the requests for conduct of pre-hearing representation votes. At that meeting, representatives of the respondent took the position that the appropriate bargaining unit would be one encompassing the three bargaining units contained in the aforesaid collective agreements but not lab technicians. The intervener took the position that there were three appropriate units, one each in each of three divisions of Plastics CMP Limited corresponding to the businesses formally carried on by the three corporations which were amalgamated to form Plastics CMP Limited.

8. All three parties agree that a single bargaining unit which would neither add to nor delete from the bargaining rights contained in the three Collective Agreements between the intervener and the Respondents would be described as follows:

all production and maintenance employees of the Respondent at its plant at 400 Plastics Road, Peterborough, Ontario, save and except foremen and supervisors and persons above the rank of foremen and supervisor, office and sales staff, and students employed during the school vacation period, chemists in the plating department (previous C.M.P. division) and quality control department and persons regularly working not more than 24 hours per week in the Moulding department (previous Kawartha Moulding Division).

Clarity Note: For the purposes of clarity the parties agree that that line technicians and lab technicians in the plastics C.M.P. division have not been included in the bargaining unit as described.

It is not clear that the parties are correct in saying that a unit described in this way would cover all those who were covered by the three expired agreements. We note, for example, that students were not excluded from the bargaining units covered by the interveners agreements with Peterborough Plastic Painters Limited and the predecessor Plastics CMP Limited. It is not necessary for us to deal with that problem at this stage, however.

9. As noted above, the Applicant seeks bargaining rights broader than those currently held by the intervener. The Applicant describes its proposed unit as:

All production and maintenance employees of the Respondent at its plant at 400 Plastics Road, Peterborough, Ontario, save and except foremen and supervisors and persons above the rank of foremen and supervisor, office and sales staff, and students employed during the school vacation period, chemists in the plating department (previous C.M.P. division) and quality control department and persons regularly working not more than 24 hours per week in the Moulding department (previous Kawartha Moulding Division).

Clarity Note: For the purpose of clarity the parties agree that line technicians and lab technicians are included in the bargaining unit.

The respondent and intervener both object to the inclusion of line technicians and lab technicians on the basis that the applicant should not have the right to displace a unit with a different scope from that for which the intervener had bargaining rights.

10. All three parties agree that if the Board finds that one unit for the three files (Board files 2171-86-R, 2222-86-R, 2170-86-R) is not appropriate then the appropriate bargaining unit in each file is the one described in the Collective Agreement between the intervener and the originally named respondent, except in the case of *Plastics C.M.P. Limited*, where the applicant takes the position that the appropriate bargaining unit would be:

all employees of the Respondent at Peterborough, Ontario, save and except foremen, supervisors, persons above the rank of foremen and supervisor, office and sales staff and students employed during the school vacation period.

The applicant submits that this unit would encompass the same employees as that in the Collective Agreement between the intervener and *Plastics C.M.P. Limited*, with the addition of line technicians and lab technicians.

11. The circumstances of this case raise some interesting legal questions which may or may not ultimately have to be answered. One of those is the nature of the bargaining rights enjoyed by the incumbent trade union when these applications were filed, having regard to the corporate amalgamation which took place on January 2, 1986. The effect of amalgamation of two or more corporate entities when only one is bound by a collective agreement was addressed in *Canadian Appliance Manufacturing Company Limited*, [1979] OLRB Rep. Jan. 8 and *Re Canadian Appliance Manufacturing Company Limited* (1978), 20 L.A.C. (2d) 59 (Shime). The result in those cases was that the collective agreement formerly binding only with respect to employees of the unionized predecessor corporation was binding on all employees of the amalgamated corporation who were capable of falling within its grammatical scope. This is the same result which would obtain if the businesses of the unorganized predecessor corporations had been purchased or initiated by the unionized predecessor corporation. The effect of an amalgamation of two or more corporate entities all of which are bound by collective agreements with different trade unions was addressed in *Eaton Yale Limited*, [1971] OLRB Rep. Oct. 667, and to some extent in *Westeel Products Limited*, [1966] OLRB Rep. Dec. 718 and *Pitts Engineering Construction*, [1983] OLRB Rep. June 938. There the approach seems to have been that the amalgamation should be treated as "any other manner of disposition" under subsection 63(1) of the Act, with the result that a union which had bargaining rights for employees of a predecessor corporation would have bargaining rights with respect to a like unit of employees of the amalgamated corporation unless and until relief under subsection 63(6) is sought and granted.

12. Of course, it is not our function at this stage to determine the appropriate bargaining unit(s) in these applications. At this stage, we are only called upon to strike a voting constituency or constituencies in such a way as to maximize the possibility that use can be made of the results of votes in those constituencies once a determination of the appropriate bargaining unit(s) is made by the Board in hearings held after the votes are conducted. However powerfully all the matters referred to in the parties' submissions to date may point toward the appropriateness of a single unit for the future despite whatever the past may have held, we cannot at this stage ignore the possibility of a finding that there are two or more appropriate units of employees of what is now a single

employer as a matter of law, particularly in view of the timing differences in the applications and prior collective agreements.

13. The Board's decision in *Toronto East General and Orthopaedic Hospital, Inc.*, [1981] OLRB Rep. Feb. 225 addresses the Board's practice in an application in which the unit sought is broader than that represented by the incumbent. For reasons explained there, the Board in those circumstances establishes two voting constituencies: one corresponding to the unit represented by the incumbent and the other covering the accretion to that unit which would result if the Board adopted the applicant's definition of the bargaining unit.

14. Accordingly, we have determined that there should be four voting constituencies for the purpose of any representation votes in these applications:

VOTING CONSTITUENCY NO. 1

all employees of Plastics CMP Limited in Peterborough, Ontario, employed in that portion of its business which was conducted prior to January 2, 1986, by its corporate predecessor Plastics CMP Limited, save and except foremen and persons above the rank of foreman, office and sales staff, and chemists.

VOTING CONSTITUENCY NO. 2

all employees of Plastics CMP Limited in Peterborough, Ontario, employed in that portion of its business which was conducted prior to January 2, 1986 by its corporate predecessor Kawartha Mouldings Limited, 440 Plastics Road, Peterborough, Ontario, save and except foremen and supervisors, persons above the rank of foreman and supervisor, office, sales, quality control department, persons regularly working for not more than twenty-four (24) hours per week, and students employed during the school vacation period.

VOTING CONSTITUENCY NO. 3

all employees of Plastics CMP Limited at Peterborough, Ontario, employed in that portion of its business conducted prior to January 2, 1986 by its corporate predecessor Peterborough Plastics Painters Limited, save and except foremen, supervisors, office and sales staff.

VOTING CONSTITUENCY NO. 4

all line technicians and lab technicians employed by Plastics CMP Limited at Peterborough, Ontario, save and except foremen and supervisors and persons above the rank of foreman and supervisor.

We note that the parties were able to come to total agreement on the voting constituency in which each employee of Plastics CMP Limited fell as of the relevant dates.

15. It appears to the Board on an examination of the records of the applicant and the records of the respondent in each of these proceedings that not less than thirty-five percent of the employees in each of the aforesaid voting constituencies were members of the applicant at the time the relevant application was made. Accordingly, the Board directs that a pre-hearing representation vote be taken of the employees in each of the aforesaid voting constituencies. In each case, employees in the voting constituency on November 18, 1986 who have neither voluntarily termi-

nated their employment nor been discharged for cause between that date and the date the vote is taken will be eligible to vote. In voting constituency No. 4, voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with their employer. In the other three voting constituencies, voters will be asked to indicate whether they wish to be represented by the applicant or the intervener in their employment relations with their employer.

16. The respondent Plastics CMP Limited asks that the ballot box in any pre-hearing representation vote be sealed and the ballots cast not counted pending resolution by the Board of the outstanding issues with respect to the appropriate bargaining unit(s). Neither the applicant nor the intervener has joined in that request. Indeed, both trade union parties wish to be able to have the ballots counted before the Board's hearing begins. The respondent's concern seems to focus more on the possibility that the Board might conclude that there are three appropriate units than on any risk associated with counting the ballots cast in three separate voting constituencies. In our view, the counting of ballots cast in three (or four) separate voting constituencies cannot prejudice a finding that there is only one appropriate unit. If there is such a finding, the appropriate results in the individual constituencies can simply be added together (subject to the Board's observations in *Toronto East General and Orthopaedic Hospital Inc.*, *supra*) in order to determine the result. Accordingly, we would not direct the sealing of the ballot boxes for that reason. However, we note that the applicant has not filed a Form 9 Declaration in Board File 2171-86-R. The attention of the applicant is directed to the Board's decisions in *Halton Roman Catholic Separate School Board*, [1986] OLRB Rep. July 962 and *Northridge Plastics Limited*, [1986] OLRB Rep. July 1012. For the reasons given in those decisions, we direct that the ballots cast in voting constituency No. 2 not be counted unless and until the applicant files an apparently proper Form 9 Declaration with respect to the membership evidence it has submitted in connection with that application.

17. This matter is referred to the Registrar.

1315-83-R; 3116-83-R Lumber and Sawmill Workers Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, Applicant, v. **Projecta Engineering and Construction Inc.**, Respondent, v. Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 607, Intervener #1, v. Ontario Provincial Conference of the United Brotherhood of Carpenters and Joiners of America, Intervener #2; Lumber and Sawmill Workers Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, Applicant, v. Cencan Concrete & Tile Limited, Respondent, v. Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 607, Intervener #1, v. Ontario Provincial Conference of the United Brotherhood of Carpenters and Joiners of America, Intervener #2

Bargaining Unit - Certification - Construction Industry - Practice and Procedure - Whether trade unions other than applicant and intervener should have been given notices of the application and hearing - Issue depending on whether applicant is an affiliated bargaining agent -

Whether applicant required to represent all trades employed by the respondent on the application date if the applicant is not an affiliated bargaining agent

BEFORE: *N. B. Satterfield*, Vice-Chairman, and Board Members *J. Wilson* and *H. Kobryn*.

APPEARANCES: *L. C. Arnold* and *Eric Hauttilla* for the applicant; *Michael Demko* for Projecta Engineering and Construction Inc.; *David Greer* and *Franco Bortuzzo* for Cencan Concrete & Tile Limited; *S.B.D. Wahl*, *P. Little* and *P. Harris* for intervener #1; *Michael A. Church*, *Kauko Niemi* and *Jack Pesheau* for intervener #2.

DECISION OF THE BOARD; December 10, 1986

1. The name of the respondent in Board File No. 3115-83-R is amended to read: "Projecta Engineering and Construction Inc."

2. These are two applications for certification in which a pre-hearing representation vote directed by the Board, differently constituted, has been taken. The ballots cast in each case have been segregated and not counted pending further direction from the Board with respect to the following issues which are common to both applications:

- (1) whether the bargaining unit sought by the applicant is appropriate for collective bargaining;
- (2) whether the applicant is an affiliated bargaining agent within the meaning of clause (a) of section 137(1) of the Act;
- (3) if the applicant is not an affiliated bargaining agent, whether it is required to represent all trades employed by the respondent on the date of the making of this application; and
- (4) whether the Board should rely on the membership evidence filed by the applicant in support of its application.

3. The Board heard and considered the submissions of the parties and directed that these applications be and they are hereby consolidated respecting their common issues.

4. These applications were listed together for hearing after the taking of the representation vote and before the Board as constituted herein for the purpose of receiving the evidence and representations of the parties on the four issues. There was a challenge to the status of the Ontario Provincial Conference of the United Brotherhood of Carpenters and Joiners of America ("the Carpenters Conference") to intervene in the applications. The parties ultimately agreed that the Carpenters Conference should be made a party to the proceedings and the Board so ruled. For ease of reference hereinafter, the Board will refer to the two unions which comprise intervener #1 as "the Labourers", and if the Board needs to refer to them individually, it will refer to the Labourers' International Union of North America, Ontario Provincial District Council as "the Labourers' Council" and to the Labourers' International Union of North America, Local 607 as "the Labourers' Local 607". Similarly, for ease of reference, the Board will refer to the respondents collectively in the singular. If there is need to refer to either one, the respondent Projecta Engineering and Construction Inc., will be referred to as "Projecta" and the respondent Cencan Concrete & Tile Limited will be referred to as "Cencan". The United Brotherhood of Carpenters and Joiners of America will be referred to as "the United Brotherhood" and its Local 1669, which appeared at the hearing seeking to be made a party to the proceedings, will be referred to as "the

Carpenters Local 1669". The Board will deal later in the decision with the request of Carpenters Local 1669 to be made a party.

5. An issue arose at the hearing as to whether certain trade unions other than the applicant and Labourers' Local 607 should have been given notices of the application and of the hearing. The issue of notice arises out of issue (3) above. The trade unions in question divide into two groups. One group includes three unions which were named in the interventions filed by the Labourers in the two applications: Carpenters Local 1669; United Brotherhood of Carpenters and Joiners of America, Local 1151; and International Association of Bridge, Structural and Ornamental Ironworkers, Local 759. The other group includes certain building trades unions which are alleged to hold bargaining rights, by virtue of collective agreements between those unions and the Construction Association of Thunder Bay, for any persons employed in those trades by the respondent. Some of these agreements ceased to operate with the introduction in 1978 of province-wide collective bargaining in the industrial, commercial and institutional ("ICI") sector of the construction industry. Others are alleged to continue to operate and to have been in force at the time these applications were made.

6. The Board did not give notice to the three trade unions listed by the Labourers as parties to whom notice of the applications should be given. Nor did the Board serve them with notice of the hearing. Counsel for the Labourers raised the issue at the hearing. Accordingly, the Board heard the evidence and representations of the parties respecting whether there were other trade unions which should be given notice of the proceedings. Having considered the evidence and representations of the parties and for the reasons set out hereunder, the Board finds as follows.

7. Labourers' Local 607 displaced the applicant in 1982 as bargaining agent for the respondent's employees and was certified on its own behalf and on behalf of various other local unions of the Labourers' Council respecting the ICI sector of the construction industry in the Province of Ontario and on its own behalf respecting all other sectors in the Districts of Thunder Bay, Rainy River and Kenora (including the Patricia portion), to represent the respondent's construction labourers and all employees engaged in cement finishing, restoration and waterproofing. The applicant now seeks by this application, to replace the Labourers as bargaining agent for the respondent's employees. In general terms, the applicant appears to be seeking to regain the same bargaining rights which it lost to intervenor #1 in 1982. Whether in fact that is the case remains to be determined when the applications are heard on their merits. What is clear, the applicant is not seeking bargaining rights respecting the other trades which Labourers' counsel claims are entitled to notice of these proceedings.

8. The issue of whether there are other trade unions which should receive notice of these applications arises solely from issue (3) above, an issue raised by the Labourers' intervention. It is one of several challenges by the Labourers respecting whether the bargaining unit sought by the applicant is a unit appropriate for collective bargaining. The argument as the Board understands it is as follows. If the applicant is not an affiliated bargaining agent and since it is an industrial union, the Board's policy respecting appropriate bargaining units in the construction industry would require the applicant to organize all construction employees of the respondent who, on the date of making the application:

- (1) were not represented by any trade union; or
- (2) were represented by a trade union under a collective agreement for which it would have been timely to make application to terminate or displace the bargaining rights in the collective agreement. Counsel contends that the respondent is bound to the provincial agreements of various

building trades, allegedly as a result of having been bound to collective agreements between those unions and the Construction Association of Thunder Bay ("the Construction Association"). Since all provincial agreements expire by force of statute biennially on April 30th in the even years, applications for certification of any of the employees in the bargaining unit defined in a provincial agreement can be made only biennially on or after March 1st in the even years. The Act operates to provide a minimum 'open period' of two months duration for such applications. Thus, with respect to provincial agreements, applications made between March 1st and April 30th of an even year, as these were, would be timely.

9. Counsel's argument, simply put, is that Board policy respecting appropriate bargaining units in the construction industry for an industrial type of trade union, which is not an affiliated bargaining agent, requires that the union apply to represent all employees in all trades employed by the respondent on the date of the application who are not represented in collective bargaining by any trade union, or for whom any trade union is bargaining agent, if that trade union's collective agreement was in its "open period" when the application was made. Or, to put it another way, according to counsel, Board policy respecting appropriate bargaining units in the construction industry does not permit an industrial type of trade union, when seeking bargaining rights in the construction industry, to be selective of the trades which it will represent. Rather Board policy requires it to represent all trades which were available for representation at the time the application is made. Should the Board agree with counsel, the bargaining rights of all of the trade unions to whose provincial agreements the respondent might be bound could be affected by the bargaining unit issue in these applications. That, according to counsel, is why any unions which *prima facie* have bargaining rights and any of their members employed by the respondent on the making of these applications should have been given notice of them and of the hearings into them. Counsel argues further that, since the issue of whether the applicant is an affiliated bargaining agent is integral to the appropriate bargaining unit issue, the Board must hear them together and all trade unions whose bargaining rights might be affected by the Board's decision on the bargaining unit issue, therefore, are entitled to notice of and the opportunity to participate in the determination of both questions.

10. Whether the Board should have given notice of the application and of the hearing in the first instance to other trade unions, or whether they should be given notice now depends on a number of different circumstances.

11. First, the application contains the declaration that the parties to it are parties to which sections 117 to 137 of the Act apply. The declaration is not disputed, but one of the conditions for it to be correct is for the applicant to be a trade union which, within the meaning of section 117(f) of the Act, pertains to the construction industry. The Board previously has found the applicant to be a trade union within that definition and, therefore, a trade union entitled to bring applications for certification under the construction industry provisions of the Act. The applicant also has stated in the application that sections 137 to 151 should not be applied to the application. The statement is incorrect because the Board has found that section 144 of the Act "... deals with all possible applications for certification in the construction industry.". *Clarence H. Graham Construction Limited*, [1981] OLRB Rep. Sept. 1195, at paragraph 7. As a result of that finding, an application for certification to which sections 117 to 137 apply, brought by a trade union as defined in section 117(f), must be processed pursuant to section 144 of the Act. Therefore, a trade union which is an affiliated bargaining agent of a designated bargaining agency must bring its applications for certification under subsection 1 of section 144 if it relates to the ICI sector, or subsection 3 if it does not.

A trade union which is not represented by a designated employee bargaining agency may bring an application under subsection 5 without reference to sector. Thus the Board's determination whether an applicant is an affiliated bargaining agent is central to deciding under which of subsections 1, 3 or 5 of section 144 an application will be processed. The subsection under which the application is processed, in turn, will influence the description of the appropriate bargaining unit.

12. The foregoing circumstances make it abundantly clear that the Board cannot begin to come to grips with the bargaining unit issue until it determines whether the applicant is an affiliated bargaining agent. That is sufficient reason for the Board, having regard to its authority under section 102(13) of the Act to determine its own practice, to sever, hear and decide the affiliated bargaining agent issue before proceeding further. The parties who have a legal and direct interest in that issue are already parties to the proceedings and no further notice is required to proceed with that issue. Moreover, the issue respecting whether the applicant is an affiliated bargaining agent within the meaning of clause (a) of section 137(1) of the Act was already before another panel of the Board in File No. 1856-83-R when these applications came on for hearing. That panel has completed hearings into the issue and has reserved its decision. How the Board decides the affiliated bargaining unit issue in that case, from a practical viewpoint, might be dispositive of the issue in these applications.

13. Second, if the applicant is an affiliated bargaining agent, its application must be brought under section 144(1) of the Act because the applicant has made the application relate to the ICI sector. (See *Colonist Homes Ltd.*, [1980] OLRB Rep. Dec. 1729). Therefore, the bargaining unit would have to conform to the requirements of section 144(1). For the same reasons as are given in the Board's decision in *Clarence H. Graham Construction Limited*, [1981] OLRB Rep. Sept. 1195, the trades which the applicant seeks to represent would not be appropriate for including in a unit which would satisfy the requirements of section 144(1). Even were it held that the applicant could come under section 144(5) of the Act because it was an affiliated bargaining agent, but was not represented by a designated employee bargaining agency, the Board would not certify the applicant because, by operation of section 146(2) of the Act it could not make a lawful collective agreement for employees in the trades it seeks to represent. (See the Board's decisions in *Diversified Sheet Metal Limited*, [1981] OLRB Rep. Nov. 1575 and *Manacon Construction Limited*, [1983] OLRB Rep. Mar. 407). Obviously, the application as framed could not succeed if the applicant is found to be an affiliated bargaining agency. It follows, therefore, that the only possible need for giving notice to other trade unions might be if the applicant is found not to be an affiliated bargaining agent.

14. Third, it is only if the Board finds the applicant not to be an affiliated bargaining agent that issue (3) arises at all, and it is only if that issue arises that there might be a problem with notices. If the applicant is found not to be an affiliated bargaining agent, the issue would arise if there were employees of the respondent at work in trades other than "...construction labourers and all employees engaged in cement finishing, terrazzo tile laying, waterproofing and restoration...". That circumstance would require the Board to deal with the contention of Labourers' counsel that the bargaining unit in each application should be described, to quote from the Labourers' intervention, so as to "...include a complete list of all trades employed by [the respondent] on all job sites both within the industrial, commercial and institutional sector and all other sectors of the Construction Industry within the single geographic area.". If the respondent employed, on the application date, trades other than those included in the unit proposed by the applicant, the bargaining rights held by any bargaining agent of those employees would be placed at risk by the bargaining unit proposed by the Labourers. Therefore, the Board would be required to serve notice of the hearing into the bargaining unit issue on any trade union which, *prima facie*, possesses bargaining rights for any other trades employed by the respondent.

15. The Board notes that, if there are trade unions which should be served notice of the hearing into the bargaining unit issue, there also would be an obvious potential problem respecting the employees whom those trade unions represent and who were at work on the date of application. This is because, should the Board accept the Labourers' prescription for the appropriate bargaining unit, these employees should have had notice of the vote. That problem would not be remedied by giving notice to them or to their bargaining agents of the hearing into the bargaining unit issue. The more likely remedy would be either to dismiss the application or direct that another representation vote be held.

16. Labourers' counsel argued that all trade unions which had collective agreements with the Thunder Bay Construction Association prior to 1978 when the province-wide bargaining scheme in the industrial, commercial and institutional sector of the construction industry came into effect, *prima facie*, have bargaining rights for their trades with the respondent. Their bargaining rights, counsel argues, might in future be affected by the Board's determination of the bargaining unit issue in this case, therefore, they also should be given notice of the hearing of that issue. The Board disagrees. Board Policy respecting bargaining units has developed on a case by case basis from issues raised by parties who have a direct, legal interest in the applications at issue. The Board does not make party to a particular proceeding any person who in future may be affected in some other proceeding by the outcome of the case. There is no reason for the Board to depart from the practice in determining the merits of these applications.

17. Neither the Board's record nor the evidence before the Board discloses with certainty whether there were trades employed by the respondent on the application date other than those sought by the applicant. The Board needs that information in order to decide whether there are other trade unions, including Carpenters Local 1669, which should be given notice of the bargaining unit issue, or whether notice should be given to the Thunder Bay Construction Association. Therefore Projecta Engineering and Construction Inc. and Cencan Concrete & Tile Limited are directed to advise the Board whether they employed on the application date any employees other than those employees and trades appearing on the lists which they have filed with the Board. The date of application for Projecta and for Cencan was April 2, 1984. If there are additional employees to report, the information shall include their names and occupational classifications and they should be identified as to which of Schedules "A", "B", "C" and "D" their names apply. This information is to be filed with the Board on or before December 23rd, 1986. The other parties to these applications will have the opportunity to comment on any additional information before the Board acts upon it.

1309-86-M United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, Applicant, v. **Robert B. Somerville Company Limited**, Respondent

Collective Agreement - Construction Industry Grievance - Whether pipeline distribution agreement or mainline agreement applicable to project in issue - Project consisting of construction of section of natural gas pipeline between regulating station and Consumers Gas station - Agreement unambiguous - Project involving the construction of distribution pipeline - Grievance dismissed because distribution agreement complied with

BEFORE: *G. T. Surdykowski*, Vice-Chairman, and Board Members *R. J. Gallivan* and *W. F. Rutherford*.

APPEARANCES: *Paul Timmins* and *Chris Thurrott* for the applicant; *Carl W. Peterson*, *Jim Abraham*, *Tom Dunleavy*, and *Patrick Davies* for the respondent.

DECISION OF THE BOARD; December 18, 1986

1. This is a referral of a grievance to the Board pursuant to the provisions of section 124 of the *Labour Relations Act*.

2. The applicant trade union alleges that the respondent has violated the job notification and pre-job conference requirements, the hiring procedures, and the wages and benefits provisions of the United Association Mainline Pipeline Agreement for Canada between the Pipeline Contractors Association of Canada and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (hereinafter the "Mainline Agreement") with respect to pipeline construction by the respondent along Highways 35/115 in May, June and July 1986. The respondent's position is that the collective agreement applicable to the project in question was the United Association Distribution Pipeline Agreement for Canada between the Pipeline Contractors Association of Canada and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (hereinafter the "Distribution Agreement") and that that collective agreement was complied with in every way. The applicant and the respondent are bound by the terms and conditions of both of the aforesaid collective agreements. In argument, the applicant union abandoned its claims with respect to all but alleged breaches of the wages and benefits provisions. It was common ground that the work in question proceeded in accordance with the distribution agreement. Consequently, the sole issue before the Board is which collective agreement applied to the project.

3. Of necessity, the Board must interpret and apply the provisions of the two collective agreements. Article 1 of the Mainline Agreement contains the following provisions:

A. MAINLINE PIPELINES shall include:

1. Cross-country pipelines including portions of such pipelines within private property boundaries which are an integral part of the pipeline system.
2. Pipelines to or from storage facilities.
3. Pipelines constructed as underground cable conduits between originating plant terminals and town border stations.
4. Pipelines transporting water slurries for irrigational, waste disposal, industrial, com-

mercial, institutional or residential use, other than process water supply or discharge lines and water or sewage laterals, the construction of which employs the same or similar methods, equipment, or organization as used in performing the work described above.

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C. EXCLUSIONS from the coverage of this Agreement shall be:

1. Distribution Pipelines as defined in and covered by the United Association Distribution Pipeline Agreement for Canada.

• • •

F. DEFINITIONS of terms contained in and for purposes of this Agreement shall include:

1. "First metering station or connection" means that point which divides mainline transmission lines or higher pressure lateral and branch lines from lower pressure distribution systems. If a metering station or connection is located on a mainline transmission line, then the mainline pipeline construction includes construction of all pipelines up to the point at which lower pressure distribution systems take off from higher pressure lateral and branch lines. This definition shall be interpreted as being subject to the definition of distribution work as contained herein;
2. "Town border station" means that point at which deliveries to the distribution systems begin and are transformed, metered, or measured;

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The Distribution Agreement provides, in Article 1, as follows:

A. DISTRIBUTION PIPELINES shall include:

1. All pipelines for distribution of gas, oil, and/or products and water which are downstream from the first metering station or connection or the town border station and up to the industrial, commercial, or institutional meter.
2. All service lines including portions of such pipelines within private property boundaries up to and including the domestic meter, and the first joint or connection through the wall.
3. Distribution piping could be manufactured from iron, steel, aluminum, copper, brass, plastic or any other materials which might be substituted for the aforementioned.
4. Oil and gas gathering lines which connect directly from the well to the mainline or to or from products extraction or processing plants.
5. Pipelines constructed as underground cable conduits from town border stations to industrial, commercial, institutional, and residential meters.
6. Pipelines or pressurized liquids or slurries within the limits of cities or towns, other than service lines or laterals, the construction of which employs the same or similar methods, equipment or organization as used in performing the work described above.
7. All pipeline 6" diameter and under.

B. EXCLUSIONS from the coverage of this Agreement shall be:

1. Mainline pipelines as defined in and covered by the United Association Mainline Pipeline Agreement for Canada.

• • •

D. DEFINITIONS of terms contained in and for the purposes of this Agreement shall include:

1. "First metering station or connection" means that point which divides mainline transmission lines or higher pressure lateral and branch lines from lower pressure distribution systems. If a metering station or connection is located on a mainline transmission line, then the mainline pipeline construction includes construction of all pipelines up to the point at which lower pressure distribution systems take off from higher pressure lateral and branch lines. This definition shall be interpreted as being subject to the definition of distribution work as contained herein.

2. "Town border station" means that point at which deliveries to the distribution systems begin and are transformed, metered, or measured.

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4. The essence of the applicant trade union's position is that any pipeline construction performed "downstream" from a station at which there is a relatively large reduction in pressure like that at "farm taps" and at the regulating station outside of each of the Towns of Lindsay and Peterborough is distribution work to be performed under the distribution agreement and that all other pipeline construction is to be performed under the mainline agreement. Counsel for the union agreed that as a practical matter this interpretation would generally require that pipeline construction in an urban area be done as distribution work while pipeline construction in a rural area would generally be mainline work. In that regard also, the applicant submitted that the relevant provisions of the collective agreements are ambiguous and sought to adduce evidence with respect to the language in past collective agreements and the past practice relating thereto.

5. The respondent's position is that there is no ambiguity, patent or latent, in the provisions of the collective agreements which counsel submits specify that any pipeline construction downstream from the first station that either reduces the pressure under which the natural gas is transmitted, or "transforms", or measures the gas passing through it is distribution pipeline work. In the alternative, counsel submits that the relevant past practice supports the respondent's interpretation.

6. In proceedings such as this, the Board sits as an arbitrator. It is an accepted rule of contract interpretation where the words of an agreement are clear and unambiguous, the intent or purpose thereof must be gleaned from the words used and extrinsic evidence with respect thereto is not admissible. However, an arbitrator is entitled to refer to extrinsic evidence to assist in ascertaining the true intentions of the parties where the agreement is patently ambiguous, or to determine whether there exists any latent ambiguity and, if one is found, the true intentions of the parties (see *Noranda Metal Industries Ltd., Fergus Division and International Brotherhood of Electrical Workers, Local 2345 et al.* (1984) 44 O.R. (2d) 529 (C.A.); *Re International Union, United Automobile, Aerospace and Agricultural Implement Workers, Local 1967 and McDonnell Douglas Canada Ltd.*, (1984) 47 O.R. (2d) 78 (Div. Ct.); *The Brant County Board of Education*, [1984] OLRB Rep. Oct. 1349). Consequently, the Board admitted evidence of prior collective agreements and past practice from both parties.

7. The actual work that gave rise to this dispute was the construction of 6600 meters of 12' diameter stainless steel natural gas pipeline running along Highways 35/115 from just north of Orono to approximately where Highways 35 and 115 separate. The project, on which 6 of the

applicant's members were employed, lasted approximately 7 weeks, from late May, 1986 to mid July, 1986. This section of pipeline is part of the Consumers Gas system. The natural gas transmitted through this piece of pipeline comes from a major Trans Canada Pipeline that brings natural gas from Alberta to Ontario and which runs parallel to and just north of Highway 401 from Maple to Montreal. There are also Trans Canada pipelines running from North Bay to Morrisburg (also known as the North Bay Short Cut) and from Morrisburg to Ottawa. It was common ground that these Trans Canada pipelines are mainline pipelines within the meaning of the collective agreements before us. The major Trans Canada pipeline along Highway 401, is really 2 pipelines, one being 30' in diameter, the other 36' in diameter. Natural gas is pumped through them at an average pressure of 800 to 1000 pounds per square inch (hereinafter "p.s.i."), depending on the demands placed upon the system. Near the intersection of Highways 35/115 and 401, a short piece of pipeline "branches off", north toward Orono. It leads into a Trans Canada metering station where the gas is 'sold' to Consumers Gas. The gas then flows into an adjacent Consumers Gas station (the "Bowmanville Station") where the gas is measured again (as a secondary check), odorized, heated, and regulated to a lower pressure of between 500 and 600 p.s.i. (depending on what is being required of the system). To odorize the gas is to transform it. This is the only station in this particular branch of the Consumers Gas system where the gas is odorized (i.e. transformed) and, but for the individual customer meters, it is the only point at which the gas is metered or measured. The gas then flows north toward to the Towns of Orono, Kirby, Lindsay, and Peterborough. Along the way to and between those urban areas other customers are served by means of "farm taps", which are individual regulating stations outside of significant urban areas that reduce the pressure at which the gas is transmitted in order to serve individual customers. At each town, there is a regulating station where the gas pressure is reduced to below 60 p.s.i. for distribution through the town distribution grid (which grid both parties agree is distribution pipeline within the meaning of the two collective agreements). There are further pressure reducing regulators commonly found in subdivisions and even on individual streets. Finally pressure is reduced still further at each individual customer's building and at each appliance within the customer's premises until it is at a level of approximately 1/4 p.s.i. when it is consumed in a typical family residence. The dispute between the parties is whether the pipeline between the Bowmanville station and the regulating station at each town is mainline pipeline or distribution pipeline.

8. In our view, the respondent's position is the correct one. We find that the words of the collective agreements, though not a model of clarity, are unambiguous. The scheme of the collective agreements contemplates an emphasis on distribution pipeline work. Further, the definition of mainline pipeline is restrictive. It defines mainline pipeline as being only that pipeline which transmits gas and oil (and their by-products) either cross-country or to or from storage facilities, or which acts as a particular kind of cable conduit, or which transmits water slurries for certain purposes where the same or similar construction processes or equipment are used. All other pipeline is distribution pipeline. The project in question did not involve construction of a cross-country pipeline. It did not involve storage facilities. It did not involve any relevant cable conduits. Its purpose is to carry natural gas, not water slurries. It is therefore not mainline pipeline work.

9. Looked at another way, the definition of distribution pipeline, though quite precise, is broader in scope than that of mainline pipeline. In our view, the work in issue in this proceeding falls squarely within the definition of distribution pipeline. This work was downstream from the Bowmanville Station which, as we have already noted, is the first station or point at which the pressure under which the natural gas in that particular branch of the Consumers Gas system is transmitted is reduced. In our view, the words "higher pressure lateral and branch lines" in article I D I. of the Distribution Agreement (and article I F I. of the Mainline Agreement) refer to pipelines like those running between North Bay and Morrisburg, and between Morrisburg and Ottawa and not to pipeline like that along Highway 35/115. Consequently, the Bowmanville Station is a

“point which divides mainline transmission lines ... from lower pressure distribution stations” and is therefore a “first metering station or connection” as defined in the collective agreements. The Bowmanville Station is also the first and only station or point at which the natural gas is transformed and metered or measured. It is therefore also a “town border station” as defined in the collective agreements. The project in question involved the construction of pipeline which is downstream from both the first metering station or connection, and the town border station, which in this case are the same point. Though it would be sufficient for the work to have been downstream of either for it to be properly characterized as being distribution pipeline work, it satisfies both criteria. It is therefore clearly distribution pipeline work within the meaning of Article 1 A-1 of the Distribution Agreement.

10. Even if the union’s suggested interpretation was correct, and we find that it is not, the result would be the same because the reduction in pressure at the Bowmanville Station is such that it is a point at which there is a large relative reduction in transmission pressure. To apply the union’s interpretation in the manner that it suggests would itself cause an uncertain and ambiguous result, unless it could be said that distribution pipeline is limited to farm taps and pipeline downstream from a pressure regulating station outside an urban area. In our view this is not a meaning that can reasonably be given to the words of the collective agreements.

11. Even if the provisions of the collective agreements are ambiguous, and we have already decided that they are not, the extrinsic evidence clearly establishes that the project in question involved the construction of distribution pipeline. The union led evidence with respect to four previous projects, all of which were completed prior to 1977. The respondent led evidence with respect to 19 distribution projects, all of which were begun and completed subsequent to 1977. In addition, we had before us collective agreements spanning the period from May 31, 1968 to the present. These collective agreements contain what we consider to be significant changes in the wording of the relevant provisions. The collective agreement for the period May 31, 1968 to April 30, 1971 covered both mainline and distribution pipeline construction. The relevant provisions are as follows:

A. MAINLINE PIPE LINES shall include:

1. Cross-country pipe lines including portions of such pipe lines within private property boundaries up to the first metering station or connection;
2. Oil and gas gathering lines which connect directly from the well to the main line or to or from gasoline extraction or gas dehydration plants;
3. Pipe lines to or from storage facilities;
4. Steel pipe lines transporting water for the purpose of water flood and repressuring systems, irrigation and domestic or industrial use, the construction of which requires the same or similar methods, equipment or organization as used in doing the work described above.

B. DISTRIBUTION SYSTEMS, for which special conditions are contained in Article XV shall include:

1. All pipe lines for distribution of gas, oil and/or products and water which are downstream from the first metering station or connection or the Town border station and up to the industrial or commercial meter;
2. All service lines including portions of such pipe lines within private property boundaries up to and including the domestic meter;

3. Distribution piping could be manufactured from iron, steel, aluminum, copper, brass, plastic or any other material which might be substituted for the aforementioned.

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E. DEFINITIONS of terms contained in and for purposes of this Agreement shall include:

1. First metering station or connection means that point which divides mainline transmission lines or higher pressure lateral and branch lines from low pressure distribution systems. If a metering station or connection is located on a mainline transmission line, then the work covered by the Agreement includes the construction of all pipe lines up to the point at which lower pressure distribution systems take off from higher pressure lateral and branch lines. IT IS UNDERSTOOD that this definition shall be interpreted as being subject to the definition of distribution work as contained herein;

2. Town border station means that point at which deliveries to the distribution system begin and are metered or measured;

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In the next collective agreement, for the period May 1, 1971 to April 30, 1974, these provisions were unchanged except that A-2 was deleted. The provisions in the collective agreement for the period May 1, 1974 to April 30, 1977 are identical to those in the 1968-71 agreement. The collective agreement for May 1, 1977 to April 30, 1979 put the provision that was A-2 into B-4 but was otherwise identical to the 68-71 agreement. The collective agreement for the period May 1, 1979 to April 30, 1981 contains the following provisions:

A. MAINLINE PIPELINES shall include:

1. Cross-country pipelines including portions of such pipelines within private property boundaries *which are an integral part of the pipeline system*;
2. Pipelines to or from storage facilities;
3. *Pipelines constructed as underground cable conduits between originating plant terminals and Town border stations*;
4. *Pipelines transporting water or slurries for irrigational waste disposal, industrial, commercial, institutional or residential use, other than process water supply or discharge lines and water or sewage laterals*, the construction of which employs the same or similar methods, equipment, or organization as used in performing the work described above.

B. DISTRIBUTION AND GATHERING SYSTEMS shall include:

1. All pipelines for distribution of gas, oil, and/or products and water which are downstream from the first metering station or connection or the Town border station and up to the industrial, commercial, or *institutional* meter;
2. All service lines including portions of such pipelines within private property boundaries up to and including the domestic meter;
3. Distribution piping could be manufactured from iron, steel, aluminum, copper, brass, plastic or any other materials which might be substituted for the aforementioned;
4. Oil and gas gathering lines which connect directly from the well to the mainline or to or from products extraction or *processing* plants;
5. Pipelines constructed as underground cable conduits from Town border stations to industrial, commercial, institutional, and residential meters;

6. Pipelines for pressurized liquids or slurries within the limits of cities or towns, other than service lines or laterals, the construction of which employs the same or similar methods, equipment or organization as used in performing the work described above.

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F. DEFINITIONS of terms contained in and for purposes of this Agreement shall include:

1. "First metering station or connection" means that point which divides mainline transmission lines or higher pressure lateral and branch lines from low pressure distribution systems. If a metering station or connection is located on a mainline transmission line, then the mainline pipeline construction includes construction of all pipelines up to the point at which lower pressure distribution systems take off from higher pressure lateral and branch lines. This definition shall be interpreted as being subject to the definition of distribution work as contained herein;
2. "Town border station" means that point at which deliveries to the distribution systems begin and are *transformed*, metered, or measured.

[emphasis added to indicate changes from previous collective agreement]

The collective agreement for the period May 1, 1981 to April 30, 1983 is labelled "Mainline" but contains provisions with respect to both mainline and distribution pipelines. Its provisions are identical to those in the 79-81 agreement except that B-7 was added as follows:

7. All pipelines 6" diameter and under.

The 1983-85 and present collective agreements contain provisions identical to the 1981-83 agreement but in separate collective agreements as set out at paragraph 3 above. In addition, the 1968-71 collective agreement has appended to it a schematic diagram showing a gas pipeline transmission system and on which the union wished to rely. It is found after the signature page and is not specifically marked as an appendix or addendum. Nor is it referred to or referenced in the body of the agreement itself. We have no direct evidence of what use this diagram was put to during that period and no such diagram was appended or affixed to any collective agreement after 1971. Article 2-D of the 1983-85 and present agreements does refer to the work covered by the terms of the agreements being "illustrated in the accompanying charts", but there are no such charts. It was the union's evidence that the chart appended to the 1968-71 collective agreement has been used for internal union purposes since the mid 1970's but not in any relations with the respondent or other contractors. In the result we are of the view that even if the diagram was once a part of a collective agreement between the parties, a proposition which is not entirely free from doubt, it is not a part of the present collective agreements. Nor, because of the paucity of evidence in relation to its preparation, use, and interpretation, is it of any real value to us as an interpretive aid.

12. The evidence of past practice does not disclose any ambiguity. It also establishes to our satisfaction that the relevant provisions of the collective agreement have been consistently applied in a manner which confirms our interpretation and application of that language as being the correct one. The "past practice" evidence of the applicant union was of little value. All of the pipeline projects with respect to which the union led evidence preceded what are in our view some significant changes in the language of the relevant provisions subsequent to May 1, 1979. That and the lack of clarity and detail in the evidence itself fails to establish any ambiguity. It also fails to establish either that the work in question was in fact mainline work or that it was work substantially the same as that in issue in this proceeding. The union has not led any evidence that persuades us that there is any meaning inconsistent with our interpretation that could reasonably be given to the applicable provisions. Nor does its evidence establish any conduct or acquiescence unambiguously based upon what it suggests is the correct meaning and application of those provisions. On the

other hand, the evidence of the respondent company establishes that the work involved in those previous projects was both distribution pipeline work and substantially the same as the work in issue before us. Indeed, taken as a whole, the evidence of past practice satisfies us that it is the first reduction in pressure, if that comes before or in conjunction with a transformation or metering of the product, that is the dividing point between mainline and distribution pipeline.

13. In the result, the pipeline construction work in question was properly done in accordance with the provisions of the Distribution Agreement. This grievance is dismissed.

2106-85-R; 2341-85-U Le Syndicat Des Employes De Ser Vaas (CSN), Applicant, v. **SerVaas Rubber Company Inc.**, Respondent, v. Retail, Wholesale and Department Store Union, AFL:CIO:CLC, Intervener; Syndicat Des Employes De Servaas (CSN), Complainant, v. La Compagnie De Caoutchouc Servaas Inc. and Real Lauzon, Respondents, v. Retail, Wholesale and Department Store Union, AFL:CIO:CLC, Intervener

Bargaining Rights - Certification Where Act Contravened - Collective Agreement - Interference in Trade Unions - Unfair Labour Practice - Rubber plant moving from Quebec to Ontario without advanced notice to union - Quebec employees terminated and not re-hired at new location - Whether plant relocation and hiring practices tainted by anti-union motive - Whether bargaining rights having extra-territorial effect - Whether collective agreement binding outside Quebec

BEFORE: *S. A. Tacon*, Vice-Chairman, and Board Members *W. G. Donnelly* and *H. Kobryn*.

APPEARANCES: *L. N. Gottheil*, *A. O. Gottheil* and *Jean Fournier* for the applicant/complainant; *R. J. Drmaj* and *Real Lauzon* for the respondent; *David Jewitt*, *Sean McGee*, *Marc Cousineau*, *Burt Lefebvre* and *Charles Quennville* for the intervener.

DECISION OF THE BOARD; December 5, 1986

1. Board File No.2106-85-R is an application for certification dated November 18, 1985, in which the applicant requests, in the alternative, that the Board certify the applicant pursuant to section 8 of the *Labour Relations Act*. With respect to the certification application, an intervention was filed on April 11, 1986, by the Retail, Wholesale and Department Store Union (RWDSU) on behalf of those persons currently employed at the Cornwall location of the respondent. Accordingly, the RWDSU was added as intervener to these proceedings and the intervener's certification application is to be dealt with in accordance with section 103(3)(b) of the Act. Board File No.2431-85-U is a complaint filed under section 89 of the Act alleging violation of sections 64,(66)(a),(b) and (c), 67, 70, 72 and 75. The Board directs that the above application and complaint be and the same are hereby consolidated. For convenience, the applicant is referred to throughout as the "union" and the intervener as the "RWDSU".

2. The circumstances of this case are exceedingly complex and must be set out in detail. At this point, however, it is necessary to summarily indicate the context in which the application/complaint arises. The respondent company operates a rubber re-cycling plant in Cornwall as of October 17, 1985, but, until that date, was located in Montreal, Quebec (also referred to

as the Ville D'Anjou plant). The respondent is a subsidiary of Curtis Publishing, a firm based in the United States. The applicant, the Syndicat Des Employes de Ser Vaas (CSN), is party to a collective agreement with the respondent at the Montreal site. Although the parties were negotiating a renewal of their collective agreement in the summer of 1985 and concluded an agreement on September 17, 1985, (effective to September 16, 1987), the applicant was not informed of the impending sale of the Montreal plant or the move to Cornwall. On the week-end of October 27, the employees were notified of the move, as a *fait accompli*, and their termination. The employees were not offered positions in Cornwall. The applicant asserts the respondent's conduct was motivated by anti-union animus, that is, a desire to rid itself of the union and its members and to escape from its obligations under the collective agreement. The applicant/complainant seeks extensive relief, including reinstatement for the Montreal employees, monetary compensation, a direction that the "Montreal" collective agreement applies to the Cornwall plant or, in the alternative, certification on the ground that, but for the alleged improper refusal to hire the Montreal employees, the applicant would have sufficient membership support or, in the further alternative, certification pursuant to section 8 of the Act. The respondent denies that the plant relocation and its hiring practices were tainted by anti-union motive or that it otherwise contravened the *Labour Relations Act*.

3. With respect to the certification application, the Registrar informed the applicant that it must prove status as a trade union within the meaning of section (1)(1)(p) of the Act. The Board heard evidence and the parties' submissions on this issue and ruled orally as follows:

The issue before the Board at this juncture is solely whether the applicant is a trade union within the meaning of the *Act*. In this regard, the Board has reviewed the evidence and submissions of the parties. As stated in *Local 199 U.A.W. Building Corporation*, [1977] OLRB Rep. July 472, there are a number of steps to be followed with respect to the formation of an organization wishing to establish its status as a trade union. The steps include a draft constitution, its approval by employees, the admission of employees to membership, the ratification of the constitution by the members and the election of officers pursuant to the constitution. The Board finds, and it is not seriously disputed, that these steps have been followed by the applicant. Indeed, the respondent and intervener did not suggest the applicant was not a trade union within the Province of Quebec.

Essentially, the respondent and intervener assert the applicant is not a trade union in Ontario because it is not "viable" within this Province and/or those eligible for membership are confined to Quebec because of the terminology used in the founding constitution and its amendment.

In the Board's view, membership in the applicant is not limited to persons from Quebec. The Board has reviewed the relevant documents and regards the reference to the "*Code du Travail*" as denoting "non-management" individuals, not a geographic restriction to Quebec. Likewise, the Board does not regard the geographic reference in the constitution as restricting the application to the Montreal region although, given the adoption of the amendments and the functioning of the applicant in accordance with that document since 1980, the Board's conclusion on this aspect does not solely turn on the words of the original constitution. That is, the Board regards the articles in the amended constitution as the relevant document.

With respect to the issue of viability, the Board adopts the reasoning in *La-z-Boy Canada Limited*, [1981] OLRB Rep. Apr. 460 and *Rockwell International Corporation*, [1981] OLRB Rep. June 780. On the instant facts, the Board is satisfied the applicant is a viable organization in Ontario. In a practical sense, given the physical location of Montreal and Cornwall, viability is not impeded. Further, given the applicant's affiliation with the CSN, the Board is satisfied that services are available through that organization which provide ample indication of the viability of the applicant in Ontario.

Finally, the Board is satisfied that, as of the date of the certification application, the applicant had members in its organization.

Therefore, the Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

FACTS

4. Two witnesses testified for the respondent, R. Lauzon, company president, and A. Barrette, personnel consultant. Seventy-eight exhibits were tendered in evidence. The applicant/complainant called no witnesses on its behalf except with respect to the question of trade union status. The status issue was heard and determined first by the Board and questions were restricted to that issue. Having weighed and assessed the evidence, including the credibility of the witnesses, the documentary evidence and what was reasonably probable in the circumstances, the Board makes the following findings of fact.

5. The applicant union was founded in March 1972 in affiliation with the Confederation des Syndicats Nationaux (CSN). At that time, the rubber re-cycling plant was owned by UniRoyal. The union, Le Syndicat des Employes de UniRoyal, was certified for both Ville d'Anjou and another Montreal location in 1973. That decision was appealed to the Supreme Court of Canada but the certification for both locations was ultimately upheld. A strike was commenced in September 1974. In June 1975, Uniroyal decided to close both locations. The union continued its strike to force Uniroyal to reopen; the factory was occupied and a boycott organized. In September 1979, the Ville d'Anjou plant was sold to the respondent. The union changed its name to Le Syndicat Des Employes De Ser Vaas and negotiated a collective agreement with the respondent effective September 17, 1979, to September 16, 1982. That was re-negotiated for the period September 1982 to September 1985 and a third collective agreement signed, as noted, September 17, 1985, for a two-year term until September 16, 1987.

6. In Montreal, the respondent operated a rubber reclamation business which re-cycled butyl rubber from scrap inner tubes and processed scrap rubber buffings to rubber dust (crumb rubber). Prior to 1982, the company also processed scrap tyres from passenger cars by removing metal and fabric from the tyres and re-cycling the tyres into rubber powder; this aspect was not recommenced following a fire at the plant in that year. Essentially, the re-cycling process may be described thus: the rubber was shredded, softened ("vulcanized"), strained to remove foreign matter, refined into extremely thin sheets (3/1000"), wrapped around a drum until sheets 3/4" thick were formed. The material was dipped in a latex solution to prevent sticking, cooled, dried and stored on skids for shipment. The dip proved ineffective in preventing sticking and the company eventually discontinued using this type of coating. In the tyre reclamation process, the tyres were shredded, the metal and fabric removed and the rubber ground into dust. The tyre dust was placed in a mixer with water and chemicals, then in a "devulcanizer" to reverse the vulcanization process. The water was removed from the mixture in holoflite driers and a press. Finally, the product

passed through the strainer and mill line. The two operations utilized the same equipment for part of the process and different equipment for other stages.

7. The Montreal operation was plagued with difficulties. The equipment was aging and costly to maintain and repair; breakdowns were not uncommon. Moreover, the design of the plant was flawed in that a screw conveyor was utilized to move the material through the processing steps. This conveyor system, in particular, contributed to the frequent contamination of the product. There were problems with the sheeting sticking together on the skids as well. A latex dip was developed but, as noted, did not fully eliminate the difficulty. Complaints from customers about the quality of the product, the failure to meet specifications and sticking were common; numerous letters to that effect were tendered in evidence. The company had difficulty in retaining customers and, further, incurred costs to replace orders rejected as unfit by customers and to reimburse losses occasioned by the poor quality.

8. A production committee of union and management representatives had been formed in 1982 to deal with all problems relating to productivity. The committee met weekly. Through the committee, the union received detailed information concerning the company's operation, including financial data.

9. A serious fire stopped production at the plant from September 1982 until March 1983, when the butyl rubber operation re-commenced. The company evaluated re-starting the scrap tyre operation; the union strongly supported re-starting this process. Some equipment was purchased and the company's line of credit increased from \$400,000 to \$525,000. Unfortunately, the estimates of capital investment and construction costs were wildly under the mark. By 1985, after expenditures of over \$500,000, the scrap tyre process was not yet operational and the market was shrinking as potential customers (e.g., Goodyear) decided not to utilize reclaimed rubber as part of the mix in their products. The company decided to suspend the scrap tyre project at least temporarily. In contrast, it should be noted that the market for butyl and crumb rubber was regarded as stable.

10. By the spring of 1985, the company had a number of financial problems. Apart from a modest net profit in 1983, the company had consistently operated at a net loss. The company approached several lending institutions for additional funds, seeking to re-mortgage the property but was turned down because the firm did not show a trend of profitability and the plant was regarded as a single use structure. The parent firm, while financially healthy, faced liquidity problems at that time because of expansion into Mexico and, thus, could not divert the funds to Ser Vaas at the levels needed. Hydro Quebec had changed its main line voltage in the area in 1984. Temporary devolvers had been installed at the company's property line but Hydro was now insisting on the conversion of the equipment to accept the higher voltage. Cost estimates for the conversion were in the order of \$200,000. In late spring, environmental control bodies at the provincial and municipal levels notified the company that modifications to the operation would be required to comply with emission regulations; the costs involved were not insignificant. Back taxes in the amount of \$73,000 were owed and eventually paid in May 1985 by the parent firm to avoid a directed sale of the property. And, accounts payable were ninety (90) days overdue. All this information was disclosed to the production committee, of which the union president, J. Fournier, was a member until January 1985 when he was replaced by M. Fournier, the union vice-president. J. Fournier, however, frequently continued to attend meetings.

11. In early 1985, the company was approached by Montco, the adjacent firm, as to whether the respondent was interested in selling the eastern portion of their property. Montco wished to expand their operations. The production committee was informed of the overture; the union, through J. Fournier, expressed vehement opposition. As the company's financial woes mul-

tiplied, in the late spring of 1985, the parent company approached Montco through the respondent's management as to the possible sale of the entire property, consisting of 10.3 acres. The parties entered negotiations: in early July a price of \$1.1 million was agreed but other crucial terms remained to be discussed. Finally, a tentative sale date was set for September 3, 1985. Both parties would share the facilities until December 31, 1985 and April 30, 1986, for various parts of the plant, under a lease back arrangement from Montco to Ser Vaas. Montco needed access as of closing to start extensive modifications. Indeed, the plant was gutted internally and major structural changes carried out as well. Ser Vaas needed to schedule the shut-down of its operations, store equipment pending disposal, etc. The arrangement reached accommodated those interests. On the morning of September 3, the parent firm, by telephone, directed Lauzon to proceed with the sale. Proceeds from the sale were used to cover, in part, liabilities including discharging the mortgage, loans for equipment, taxes, accounts payable, etc.

12. As the prospect of a sale to Montco became more likely, the parent considered its options with respect to Ser Vaas. These options including closing the plant or its relocation elsewhere in Quebec, Ontario or the United States. The possibility of constructing a new facility was evaluated and rejected because of the time frame for the sale and lease arrangement. Various sites were visited or evaluated by Curtis officers and/or Lauzon. For example, Valleyfield, Quebec and Hawkesbury, Ontario were considered. The latter was visited more than once by Lauzon, sometimes accompanied by a real estate agent and consulting engineer. Hawkesbury was eventually rejected as the contractor could not guarantee construction dates. Also in Ontario, a site in Cornwall was visited by Lauzon and twice by Paul Ser Vaas (a Curtis officer). In July, Lauzon and both Paul Ser Vaas and Dr. B. Ser Vaas (chairman of Curtis) toured five possible locations in Indiana. Several sites in New York state, particularly Messina, were evaluated and visited. Criteria included a free-standing building which could accommodate the expanded operation now contemplated and location in relation to the firm's customers and suppliers. Lauzon listed the various customers and suppliers by location but the Board does not regard it as useful to reiterate that itemization herein except to note that the uncontradicted evidence was consistent with the criteria stated. In Canada, proximity to the international bridges was a factor as that would result in significant savings for custom brokerage fees. Around September 7, 1985, Dr. B. Ser Vaas visited the Cornwall location; it was tentatively agreed that, if a reasonable lease could be secured, that would be the site of the new operation.

13. Apart from the disclosure of Montco's initial interest, the negotiations and sale were kept entirely confidential notwithstanding continued meetings of the production committee and collective bargaining between the respondent and the union which culminated in the signing of a collective agreement on September 17, 1985. Lauzon candidly acknowledged the deliberate decision of the firm not to inform the union of the impending sale. He explained that the company feared that, if the employees learned of the sale, the operation would be shut down immediately, the plant occupied and equipment damaged so as to prevent the sale and/or prevent Montco from taking possession. In those circumstances, the company would not be able to hand over possession and would incur substantial liability. Lauzon pointed to several instances of similar conduct during the past few years. For example, in October 1984, despite proper notice of layoff, the employees occupied the plant in protest and locked out management. When the plant recommenced production in January, 1985, the employees refused to work until the company re-opened the collective agreement and paid compensation for the layoffs. On several occasions, the employees shut down the mill line to force the company to hire additional employees, for example. Once, when the union president (J. Fournier) was suspended pending an investigation of a fight which Fournier admitted, employees refused to work until the suspension was lifted. On another occasion, the pay cheques were delivered late because of a lack of funds; three employees carrying chains occupied the controller's office. When the company sought to discuss the absenteeism rate (in the 28% to

34% range) at the production committee, the employees boycotted meetings for several weeks until the matter was dropped.

14. It is appropriate at this point to indicate the manner in which the Cornwall site came to the company's attention. The forced re-opening of the collective agreement had occurred, in the company's view, because inventory was exhausted and the firm had to re-commence production to generate revenue. The union was fully aware of the company's inventory level because the union had earlier insisted on the replacement of a management person in shipping and receiving with a bargaining unit member. The company decided to stockpile inventory away from the plant. The inventory was entered as sales and the material stored from July 1985 onwards at the Riverside Yarn plant in Cornwall in leased space. The location was closer to an international bridge and customers, particularly those in the United States, and the lease inexpensive. Considerable additional space was available on the premises and it was this building which was considered and eventually selected for the Ser Vaas relocation.

15. On Sunday, October 27, 1985, Lauzon telephoned all employees, informed them of the plant closing and that a confirmatory letter would be delivered. The letter indicated that the closure was permanent and that the employees would not be required to report to work but would receive salary and benefits until December 27. Employees were given a telephone number to call to arrange for the collection of personal effects and tools. A separation certificate would be forwarded at the appropriate time. Three security guards prevented access to the plant for the first week. Thereafter, Montco gradually assumed responsibility for security. During the first week, one guard was stationed inside the plant. The other two, with dogs, were outside at the main gate and behind the building. The employees initially wished to enter *en masse* to collect belongings; the company demurred. An arrangement was agreed to permitting entry of employees individually, accompanied by a guard, company representative, union representative and union counsel. Employees asserted that some of their belongings were stolen; a law suit for damages was filed in Quebec. Apparently, the employees' personal property was left in garbage bags in the hall that week-end rather than in their lockers. During the preceding week, the employees unilaterally had decided their lockers should be steam-cleaned and instructed the employee responsible for house-keeping in the plant to perform those duties, which he did. Lockers were emptied to permit the steam-cleaning. Thus, on the weekend of October 26/27, the employees' possessions were temporarily left in the garbage bags in the hall rather than in their lockers.

16. In early October, 1985, Lauzon engaged A. Barrette as a part-time personnel consultant to initially hire some temporary employees. Barrette was to hire permanent employees and some management personnel as well and to provide related personnel advice. Barrette has expertise in the personnel field, had known Lauzon earlier in their careers and had recently started a consulting business. Construction needed to modify the building in preparation for production was performed by outside contractors. Temporary employees were hired by Barrette to clean equipment, paint, set up, etc. Maintenance employees were also hired gradually from November to March as needed on a permanent basis. Three of those hired as permanent maintenance were initially hired as temporary workers for the pre-production activities. A production start date of January 1986, was first contemplated but that was delayed to March because of construction difficulties.

17. Barrette satisfied the demand for temporary employees from the local market, working through the Canada Employment Centre. Ads were also placed in papers distributed in the Cornwall area. As temporary workers were needed, the Canada Employment Centre scheduled interviews with applicants; Barrette conducted those interviews and made the hiring decisions. The possibility of hiring the Montreal employees was not raised at the time. Barrette testified that utilization of the Montreal employees was not sensible given the irregular hours and temporary

duration of the initial tasks. Further, as there was considerable unemployment in the area, the company's needs were readily satisfied locally. Barrette also stated that a firm would not normally re-locate workers for temporary positions. Wage rates for the temporary employees were set by Barrette after discussion with local Canada Employment Centre officials. The company wanted the temporary and permanent maintenance staff to possess appropriate trade skills and the ads reflected this. In Montreal, the maintenance workers had formerly worked in production and were not skilled tradesmen. In Cornwall, workers were directly hired into the maintenance department. Two such employees, H. Baker and P. Menard, were hired by the company's chief engineer on recommendation of Cornwall Warehousing management rather than through Barrette. (Cornwall Warehousing management administered the entire plant site, of which Ser Vaas leased a portion.) Between November and mid-January, approximately nineteen employees were hired as temporaries. Of those, seven were terminated in that same period and three became permanent maintenance employees. Finally, it should be noted that the temporary hires all signed employment letters explicitly confirming their temporary status although it is likely some hoped a permanent position might eventually materialize.

18. In November 1985, the Montreal employees signed standard form letters indicating a willingness to report to work in Cornwall and authorizing the union to deal with the company on their behalf. In fact, communication with the company was handled by the union. The company acknowledged the November form letter stating its view that the union certification did not extend to the Cornwall location and that individuals would be contacted in the future if their services were needed. In December 1985, the union filed a grievance under the collective agreement on behalf of the employees asserting numerous violations of the contract. At the end of November, all the Montreal employees applied for work through the Cornwall Canada Employment offices. The applications were given to Barrette who passed them on to Lauzon. Both Lauzon and Barrette testified as to their discussion at the time. Lauzon instructed Barrette to consider the Montreal employees for permanent positions in production at the appropriate time.

19. It is necessary to digress for a moment at this point. In October, the employees were notified their salary and benefits would continue until December to conform to Quebec law. In January 1986, Lauzon advised F. Dube, an official with Travail Quebec, of the plant closing. The company agreed to participate in a reclassification committee composed of representatives of the company, union, Travail Quebec, the federal government and an outside consultant as a neutral chair. The committee budget was set at \$10,000: the firm contributed \$4,500 (45%); the union 5%, Travail Quebec and the federal government 25% each. The committee was to facilitate the re-integration into the labour force of the Montreal employees including co-ordinating measures offered by the company and the various public, community and private services. J. Dussault, an economist familiar with the Montreal labour market, was selected as chair. Barrette was asked to be the company representative on the committee. He acted as committee treasurer. Barrette informed the other committee members of his status as consultant and company representative.

20. The committee held its initial meeting in January and its second on February 7, 1986. The next meeting was scheduled for February 24. Before that meeting, Lauzon instructed Barrette to make arrangements to interview the Montreal employees for permanent positions in Cornwall as the company was gearing up for production. About eighteen production employees would be needed for the March start up. Barrette telephoned Dube to ascertain whether that process would involve any conflict as he also was company representative on the reclassification committee. Dube responded that there was no conflict and that Barrette should simply update the committee at the next meeting. For convenience of the Montreal employees, the interviews were arranged for February 20, in Montreal, at the Travail Quebec offices. Barrette was unavailable for the interviews before that date.

21. The first interview was scheduled for 9.30 a.m. with L. Fagnant. At that time, M. Fournier and another person, Mr. Ouellette, appeared as well and challenged the company's right to conduct interviews, asserting that was a function of the reclassification committee. Barrette explained his conversation with Dube. M. Fournier and Ouellette left and Barrette commenced the interview, i.e., discussing Fagnant's work, his interest in moving to Cornwall, and such topics. However, after a few minutes, J. Fournier (union president) interrupted and aggressively stated that the company had no reason to conduct interviews and bypass the committee, that the company should only interview the workers collectively and take all the employees as a group to Cornwall. Barrette attempted to again explain his instructions and the circumstances. J. Fournier asserted the interviews were finished and he so informed all the Montreal employees. J. Fournier and Fagnant left. The receptionist informed Barrette that there were about twenty people in the hall outside and their mood seemed hostile. Barrette decided it was more prudent to wait until they left rather than risk a confrontation.

22. Barrette immediately reported the events that morning to Lauzon by telephone. Lauzon directed Barrette, since interviews with the Montreal employees had been thwarted, to advertise locally for production employees, including utilizing Canada Employment services. Temporary employees were also to be considered. Effective March 28, a number of temporary employees were transferred to permanent staff. Other workers were hired directly for production as well. Barrette's telephone call was followed by a written report which was tendered in evidence.

23. The minutes of the reclassification committee meeting of February 24, tendered in evidence by the applicant/complainant indicated the following. Barrette attended the February 24 meeting of the reclassification committee. The employee representatives protested the company's attempt to interview the Montreal workers. After considerable discussion with the federal and provincial representatives, the employee representatives agreed to ascertain whether the Montreal employees would be willing to be interviewed individually. Barrette was to contact the company to ascertain whether the firm was still interested in considering the Montreal workers. It is not disputed that Barrette resigned as company representative on the committee at the end of that meeting, was replaced by another personnel consultant, C. Durand, and that the reclassification committee continued to meet. No further interviews with the Montreal employees were scheduled, however. The Montreal employees did receive standard form letters from the company dated March 6, 1986, wherein the company stated that interviews had been scheduled but prevented by the union which insisted that all former employees should be hired. The company indicated that it was not prepared to accede to that stance but would keep the individuals' names on file for future reference. To complete the chronology, the union replied on March 6 contesting Barrette's conduct at the interviews, disputing the company's assertion of union interference and reiterating its position that the company was acting illegally in not transferring the Montreal employees to Cornwall. Finally, by letter dated March 26, 1986, the employees signed a single statement confirming agreement with the contents of the union letter of March 6 and again indicating their availability for work.

24. It is useful now to summarize the operation presently carried out in Cornwall. Butyl rubber from inner tubes is recycled, crumb (rubber powder) is processed and scrap tyres reclaimed. Moreover, the company now manufactures custom molded and extruded rubber goods, such as, paddock fencing, weather stripping, gasket material, rubber bricks and bats. The company also does custom refining, chopping and re-grinding for customers. New and additional equipment worth over one million dollars was acquired (e.g., a sophisticated metal detector, rubber granulator) to provide this additional capability and ensure a quality product. Some equipment as well was transferred from the Montreal plant. The design flaws in the Montreal plant have been corrected. For example, rubber belts are used to convey the product. The new process and design has elimi-

nated the need for the addition of oils and powders and the likelihood of contamination. The "finishing" operation in Montreal is not needed in Cornwall as the equipment automatically performs this task.

ARGUMENT

25. The Board next sets out the arguments of counsel in an abbreviated form. In the Board's view, it is more expeditious in the circumstances to first summarize the submissions of the applicant/complainant followed by those of the respondent and intervener. It was agreed that the argument of the intervener would be in writing with opportunity for the applicant/complainant and the respondent to respond, also in writing. Such a response was received from counsel for the applicant/complainant; the respondent indicated it saw no need to file a rebuttal to the intervener's submissions.

26. Counsel for the applicant/complainant basically asserted that the employer had intentionally moved out of the province to escape the union and its members. That is, the move itself was tainted as was the failure to transfer the Montreal employees for the temporary and permanent positions. Counsel characterized the operation as financially healthy or that the parent firm could readily have provided needed funds, that this was a "runaway shop". Counsel acknowledged that the issue of bad faith bargaining was not before the Board but pointed to the deception of the union by management during collective bargaining negotiations and the circumstances of the plant closing and hiring of temporary and permanent employees as substantiating the "taint" allegations. Counsel also stressed that some non-bargaining unit personnel were relocated to Cornwall as further indication of the employer's *mala fides* vis-a-vis the union and bargaining unit employees. For the period October 27, 1985, to December 27, 1985, counsel asserted the Montreal workers retained their "employee" status under *Ontario* law and were unlawfully locked out by the employer. In the alternative, if the workers were not "employees" under *Ontario* law, it was argued that the refusal to hire for the Cornwall operation was tainted. For the period from December 28, 1985, counsel contended there was an illegal lockout or termination of the Montreal employees or, in the alternative, an improper continuing refusal to hire. Counsel reviewed the evidence, suggesting that Lauzon's explanation of the approach by Montco was ambiguous and that other sites in Quebec were not seriously considered. The projected cost savings under wages and reduction of the work force in a memo of Paul Ser Vaas dated September 10, 1985, was emphasized as further indication of an intention to escape the employer's obligations under the collective agreement. Counsel essentially dealt with the union's conduct in terminating the February interviews as understandable in the circumstances, that the employer's conduct was suspicious in scheduling interviews at all and the company should have acted through the reclassification committee and/or the union. Further, counsel stressed that the failure to re-schedule interviews after the next re-classification committee meeting was evidence of improper motive. It was argued that the current collective agreement already was applicable to the Cornwall location or, in the alternative, the collective agreement should be ordered applicable as a remedy for the various unfair labour practices alleged. Or, in the further alternative, the Board should direct that the bargaining rights of the union should extend to Cornwall even if the collective agreement itself did not. With respect to the Montreal workers, counsel asserted that there should be an order to the employer to hire, in order of seniority, the number of employees needed to replace those now working in Cornwall. Extensive compensation for lost wages, benefits, relocation expenses, etc. was sought. Given that there were forty-three bargaining unit positions in Montreal, it was asserted it was reasonable to assume all temporary positions would have been filled by those employees as at the certification date. That is, the union was entitled to automatic certification or, in the alternative, certification pursuant to section 8 of the Act in view of the alleged employer misconduct. In the final alternative, it was asserted the Board's "buildup" principles should not apply given the alleged illegal plant relocation but, if those

principles were considered, a representative sample of employees would have been hired by the end of January 1986 and it could still be assumed all these positions would have been filled by the Montreal workers. With respect to the various positions asserted, counsel referred to numerous authorities in support, including Ontario, Quebec and American jurisprudence, as follows:

Westinghouse Canada Ltd., [1980] OLRB Rep. April 577; *Sunnylea Foods Ltd.*, [1981] OLRB Rep. Nov. 1640; *Humpty Dumpty Foods Ltd.*, [1977] OLRB Rep. July 401; *Academy of Medicine*, [1977] OLRB Rep. Dec. 783; *York Hanover Developments Ltd.*, [1978] OLRB Rep. July 703; *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193; *Culverhouse Foods Inc.*, [1977] OLRB Rep. Jan. 16; *Numilk Co. Ltd.* 62 CLLC 16,237; *Livingston Transportation Ltd.*, [1976] OLRB Rep. July 346; *Harry Woods Transport Ltd.*, [1976] OLRB Rep. July 341; *Rondar Services Ltd.*, [1977] OLRB Rep. Oct. 655; *Cable TV Ltd.*, [1980] 2 Can. LRBR 381; *Dylex Ltd.*, [1977] OLRB Rep. June 357, approved (1977), 77 CLLC ¶14,112 (Div. Ct.); *Dr. Hiller's Peppermint Canada Ltd.*, [1979] OLRB Rep. May 375; *Manor Cleaners Ltd.*, [1982] OLRB Rep. Dec. 1848; *Law Society of Upper Canada v. Skapinker* (1984), 9 D.L.R. (4th) 161 (S.C.C.); *Malartic Hygrade Gold Mines Ltd. v. The Queen* (1982), 142 D.L.R. (3d) 512 (Q.S.C.); *The Board of Education for the Borough of Scarborough*, [1975] OLRB Rep. Sept. 657; *Spramotor Ltd.*, [1976] OLRB Rep. May 215; *Sherman Sand and Gravel Ltd.*, [1978] OLRB Rep. May 459; *Vaunclair Meats Limited*, [1982] OLRB Rep. March 508; *Royal Chesterfield Inc.* [1974] T.T. 353; *Canada Cold Storage Co. Ltd.* [1971] T.T. 233; *Droit du travail*, Robert Gagnon, pp.107 - 127, 147-151; *Triumph Curing Center* (1978) F.(2d) 462 (U.S. Court of Appeal, Ninth Circuit); *Westwood Import Co. Inc.* (1980) C.C.H. N.L.R.B. 17,371; *NLRB vs Marine Optical Inc.* (1982) 671 F.(2d) 11; *Olga Zdanok v. Glidden Company* (1961) 42 LC 24,163 (U.S. Court of Appeal, 2nd Circuit); *Monogahela Steel Co.* 1982-83 C.C.H. NLRB 26,087; *Allied Mills Inc.* 1974-75 C.C.H. NLRB 26,219; *M & G Convoy, Inc.* 1981-82 C.C.H. NLRB 30,422; *Royal Norton Manufacturing Co.* (1971) C.C.H. NLRB 29,628; *Ex-Cell-o Corp.* (1973) 60 L.A. 1094.

27. Counsel for the respondent asserted that the "Montreal" collective agreement was limited in its geographic scope, did not extend beyond Quebec and should not be so extended. That is, certification was a provincial responsibility and certificates in one Province should not be given "extra-territorial" effect. Further, it was argued *Rockwell International Corporation*, [1981] OLRB Rep. June 780 was distinguishable as the parties here could not be said to have intended the collective agreement to apply outside the province. *Bell Canada*, [1982] 3 Can. LRBR 13 was also cited in support. Counsel contended that the Board should not assess whether the decision to move from Montreal contravened the *Ontario Labour Relations Act*, that is, whether there was economic justification for the move as per section 77 of the Act. Rather, that was a matter for the Quebec courts. In the alternative, however, counsel stressed that the move was justified on economic grounds; the evidence concerning the lack of profitability and other financial difficulties was reviewed. Counsel also submitted that the fact that the relationship of the union and company may have been poor was not tantamount to a violation of the Act by the company in its decision to move. It was argued that the Ontario Board jurisprudence on bad faith bargaining and the duty to disclose should not be applied to bargaining in Quebec but, in the alternative, the Company had not violated the duty to bargain in good faith given the attitude of the union and employees to the company's difficulties as conveyed to the production committee. With respect to the hiring of temporary employees, counsel asserted the company was not bound to transfer persons who were still

its employees in Quebec, as the individuals were not terminated until December 27, 1985. Further, the evidence of Lauzon and Barrette, the personnel consultant, with regard to hiring temporaries did not indicate any anti-union animus. Moreover, it was submitted the evidence demonstrated that the company was prepared to consider the Montreal employees for production positions but those efforts were thwarted by the union's conduct. As to certification pursuant to section 8 of the Act, counsel argued that the requisite elements of statutory violation by the employer, some level of membership support of the applicant and circumstances in which a secret ballot would not disclose the true wishes of the employees were not present in this case. Counsel added that, as of the application date, only temporary employees worked in Cornwall and, thus, it was appropriate to apply the "buildup" principles to defer the resolution of the certification application to March when production had started and, perhaps, direct a vote with both the applicant and intervener on the ballot. In response to the submissions of union counsel, it was contended that many of the propositions were speculative and not based on the evidence, for example, that Valleyfield was not seriously considered as a relocation site, that the parent company could have bailed out the respondent by infusing the needed funds, that the union could "guarantee" all positions in Cornwall would have been filled by the Montreal workers. Counsel sought to distinguish those cases cited by union counsel and referred to the following cases in support of the respondent's positions:

Transport Labour Relations Association and Wholesale Delivery Service (1972) Ltd., [1979] 1 Can. LRBR 90; *Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees*, [1978] 1 CLRBR 493; *Wholesale Delivery Service (1972) Ltd., Overland Freight Lines Ltd.*, [1979] 3 Can. LRBR 543; *Durham Transport*, [1978] OLRB Rep. Sept. 818; *MacLeans Magazine*, [1983] OLRB Rep. Mar. 401; *Radio Shack*, [1979] OLRB Rep. Mar. 248; *Skyline Hotels Limited*, [1980], OLRB Rep. Dec. 1811; *Somerville Belkin Industries Limited*, [1980] OLRB Rep. May 791.

Finally, counsel for the respondent submitted that, if the collective agreement was extended to the Cornwall plant, the Montreal workers would be entitled to those jobs but, otherwise, the union must satisfy the usual requirement of demonstrating sufficient membership support at the new location.

28. Counsel for the intervener first dealt with the constitutional issue in its written submissions. Essentially, intervener's counsel concurred with the respondent's arguments on this aspect, that is, that labour relations are a matter of provincial jurisdiction and the Ontario Board does not have jurisdiction over alleged unfair labour practices occurring outside Ontario. Further, it was argued the applicant/complainant must seek relief for alleged unfair labour practices in Quebec in that province, that the Ontario Board has no jurisdiction to import into Ontario a collective agreement negotiated outside this province and then to amend that collective agreement in accordance with the principle in *Westinghouse, supra*, as sought by the applicant/complainant. Counsel stressed that the applicant/complainant has filed a grievance alleging violation of the collective agreement and that is the appropriate form for resolving such matters. Moreover, it was argued there were sound labour relations policy reasons for not importing into Ontario collective agreements negotiated elsewhere, including conflicts of laws problems, uncertainty in the Ontario labour relations scene for persons seeking employment at plants relocated in Ontario from elsewhere and for trade unions seeking to organize those employees and the undermining of the collective bargaining process established in Ontario should collective agreements, together with the former work force, be transferred. With respect to the alleged unfair labour practices in Ontario, counsel for the intervener submitted the evidence did not support the applicant/complainant's contention that the Montreal workers were discriminated against. Rather, it was argued that the applicant/complainant's insistence that all of the Montreal workers be hired at once and the

applicant/complainant recognized as their bargaining agent, culminating in the events at the February interviews, precluded a finding by the Board that the respondent would have discriminated against the Montreal workers on the basis of their membership in the applicant/complainant. Having regard to the various remedies sought by the applicant/complainant, on the assumption that the Board concluded the respondent has breached the Act, counsel for the intervener essentially submitted the Board should not extend the Montreal collective agreement and retroactive "employment status" in Cornwall to the Montreal workers so that the applicant/complainant would automatically be certified, as this would be inequitable to the current Cornwall employees. Counsel referred to the concept of specific performance to assert the appropriate relief for the Montreal workers was an award of damages as per *Textile Workers Union of America v. Darlington Manufacturing Company* (1965), 58 LRRM 2657 and/or a direction that the Montreal workers be placed on a preferential hiring list for any new positions at the Cornwall plant. With respect to certification pursuant to section 8, counsel contended this relief was not appropriate in the particular circumstances of this case given the effect on the rights of innocent third parties. Further, in view of the refusal by the Montreal workers to be considered for employment unless all were hired and the applicant/complainant recognized its bargaining agent, it was argued the Board could not assess the level of support enjoyed by the applicant/complainant at the terminal date. Moreover, it was submitted that, at the terminal date, the applicant enjoyed no membership support or insufficient membership support to warrant certification pursuant to section 8. In conclusion, counsel for the intervener argued the applicant/complainant's certification application should be dismissed, the intervener's certification application proceeded with and, if the Board found any statutory breaches by the respondent, an award of damages constituted the appropriate form of relief.

29. In reply to the intervener's submissions, counsel for the applicant/complainant asserted that the applicant/complainant was relying on illegal conduct in Ontario to justify its relief. That is, either the Montreal employees were locked out of the Cornwall plant (as they remained employees until December 27, 1985) or were discriminated against in the hiring process on the basis of their membership in the applicant. Moreover, it was stressed that the company's conduct, even that in Quebec, was relevant to the question of anti-union animus and the Board's remedial discretion. Counsel also submitted the failure to disclose the move and to consult with the union constituted a violation of sections 64 and 66. On the constitutional aspect as well, counsel argued that the fact that the decision to move was implemented in Ontario was sufficient to give the Board jurisdiction and that the Board should not condone a relocation to Ontario as an "escape hatch" for employers seeking to flee from their obligations under a collective agreement in Quebec. Further, counsel submitted, as at September 17, 1985, when the collective agreement was signed, the company was essentially "an Ontario firm" notwithstanding a lack of a physical presence in the province and, thus, the collective agreement was binding in Ontario. With respect to relief, counsel stressed that the Montreal workers should not be discriminated against because of their current residence in Quebec and that reinstatement for breach of the Act was not novel. Counsel asserted the Ontario Board, in *Sunnylea Foods, supra*, had rejected the ratio of the *Darlington* case, *supra*, and, further, in *Darlington*, the plant was permanently closed and not just relocated. Counsel for the applicant/complainant agreed with the direction of a preferential hiring list but consisting of current Cornwall employees in order of seniority once all Montreal workers had been offered jobs. Finally, counsel reiterated his submissions regarding section 8 and added that, in the alternative, the Board should consider certification pursuant to section 7(3) without the requirement of representation vote for "buildup" or other reasons on the ground that the events more closely corresponded to a layoff and recall to an identical operation rather than a new plant and that there was clear support for the applicant by the Montreal workers who would have filled all positions as at the terminal date.

DECISION

30. The instant certification application/complaint is exceedingly complex both with respect to its factual context and the legal issues and, further, at least in some respects, is novel. Numerous authorities were cited in support of the various positions of the parties. The Board does not regard it as useful or appropriate to enter into an exhaustive recitation of the relevant jurisprudence or a detailed comparison of the facts in the instant case with those cited. It was not asserted that any of the authorities were "on all fours" with the circumstances of this application/complaint. Rather, counsel sought by reference to some asserted "common" elements or by analogy to apply or extend various jurisprudential principles or approaches in the cases referred to in support. The Board does refer to the case law as support for various propositions and principles as appropriate. The Board would comment with respect to the American jurisprudence cited, however, that those cases were not of assistance because of the markedly different statutory provisions and Board doctrines regarding, for example, certification, jurisdiction over labour relations, plant relocation or closure, remedial relief. The Board does not consider it useful to relate those differences in detail in the present application/complaint.

31. The Board also comments at this juncture that the complexity of the facts and legal issues renders a "compartmentalized" analytical format extremely difficult. Nonetheless, the Board intends to deal with the matters raised in the following broad categories, with cross-references as appropriate and with the question of remedy separate: status of the Montreal collective agreement and the bargaining rights of the applicant; decision to close the Montreal plant and selection of the relocation site; hiring of temporary and production workers; certification application, including section 8; intervention.

Status of the Montreal Collective Agreement and the Bargaining Rights of the Applicant.

32. Counsel for the applicant/complainant asserted, for various reasons, that the Montreal collective agreement, as a matter of law, covered the Cornwall location or, in the alternative, the bargaining rights of the union extended to that location. The Board does not agree. Certification of a trade union is a provincial matter, except for those enterprises regarded as falling within the federal sphere. In Ontario, for example, certification is granted to a bargaining agent for a defined geographic area, whether that be street address of a single plant or municipality or some other geographic configuration. The Board is not prepared to give "extra-territorial" effect to the bargaining rights of a trade union as a matter of law, that is, that once certified in one province or federally, those bargaining rights are "portable" across provincial boundaries or notwithstanding a change in the nature of the enterprise from the federal to provincial sphere (or vice versa): *MacLeans Magazine*, *supra*; *Labour Relations Board of New Brunswick v. Eastern Bakeries Ltd.* (1960), 26 D.L.R. (2d) 332 (S.C.C.); *Saint Paul University*, [1972] OLRB Rep. July 729; *Bell Canada*, *supra*; *Durham Transport*, *supra*; *Wholesale Delivery Service*, *supra*; *Brotherhood of Railway Airline & Steamship Clerks*, *supra*; *Transport Labour Relations Association*, *supra*. To grant such extra-territoriality, in the Board's view, would be contrary to provincial authority over labour relations as reflected in the various provincial labour relations statutes governing certification. (For this analysis, the Board need not deal with the case law elaborating on the limited federal sphere in labour relations). That is not to say that a union certified as bargaining agent in one province, for example, could not be granted voluntary recognition in another province and, thus, "continue" to hold bargaining rights. In the instant case, however, no such voluntary recognition was granted.

33. The Board considers that the bargaining rights of the applicant/complainant could apply to the Cornwall location only if the collective agreement itself covered that site. That question depends upon the scope clause of the Montreal collective agreement. Counsel for the

applicant/complainant asserted that the scope clause should not be restricted to Montreal, that "street address" descriptions were commonplace and should not represent an intention to so delimit the collective agreement. Again, the Board disagrees. The instant case is readily distinguishable from *Rockwell International*, *supra*, where the Board found that the contents of the collective agreement and its interpretation over the years supported a conclusion that the parties intended an "open-ended" recognition clause. Here, there is no basis for importing such an intention. Assuming that, by operation of Quebec law, the collective agreement would have extended to company "relocations" elsewhere in Quebec, for the reasons already given, the collective agreement cannot bind the employer outside that province, except in the *Rockwell* circumstances, or, perhaps, as a matter of remedy for statutory violations (see also the cases cited in paragraph 32 above).

34. Counsel for the applicant/complainant submitted that the most recent collective agreement (signed September 17, 1985) was entered into by the company which was actually an "Ontario" firm, notwithstanding the lack of a physical presence in the province at that time, because the decision to relocate there had already been taken. That is, it was argued the firm was bound to that collective agreement in Ontario. Again, this analysis is not compelling. Both parties clearly intended the collective agreement to cover only the Montreal operation. Indeed, the union knew nothing of the relocation decision. Moreover, the union did not hold bargaining rights except in respect of the Montreal plant nor, as stated, did the company grant the union voluntary recognition in Ontario. That the respondent had decided to close the Montreal operation does not transform the legal effect of the collective agreement.

35. Thus, the Board finds that the collective agreement does not extend to the Cornwall operation and the union does not possess bargaining rights there as a matter of law.

Decision to close the Montreal Plant and Selection of Relocation Site

36. Counsel for the applicant/complainant characterized the company as a financially healthy operation which sought to escape its collective bargaining obligations, in effect, as a 'runaway shop'. Where a company closes its operation and/or relocates and the collective bargaining relationship is thereby vitiated, the Board must carefully scrutinize the reasons proffered by the firm for its decision to assess whether the motive, even in part, was tainted by anti-union animus: *Westinghouse Canada*, *supra*; *Sunnylea Foods*, *supra*; *Humpty Dumpty Foods*, *supra*; *Academy of Medicine*, *supra*; *Livingston Transport*, *supra*; *Harry Woods*, *supra*. An employer seldom candidly acknowledges such an intention; generally an economic justification is cited. The Board must look to all the circumstances and the evidence of economic justification in reaching its determination.

37. In the Board's view, the proposition that this firm was financially healthy can only be based on a highly selective reading of the documentation. Quite simply, the firm was not profitable after several years of operation. Further, the prospects for profitability were bleak. The Board does not intend to recapitulate its factual findings to this effect as set out in paragraphs 7, 9 and 10 above, except to comment that the difficulties may be classified as relating to a flawed plant design, overextended credit line and cash flow problems in the face of several substantial expenditures which were due (e.g., back taxes, Hydro conversion, pollution equipment). Counsel for the applicant/complainant suggested the parent firm could have bailed out Ser Vaas. The evidence, however, indicates the parent faced liquidity problems of its own at the relevant point in time. Further, the union was receiving detailed information on all these difficulties through the production committee and simply rejected the company's statements. This is *not* a case where a company decision to move or close is coincident with a union organizing campaign and/or certification. Moreover, it was the adjacent firm, Montco, which initially approached Ser Vaas about the sale of a portion of its land for expansion and ultimately purchased the entire location. The sale clearly

afforded Ser Vaas an opportunity to leave a plant where the flawed design resulted in serious problems of quality control with consequent loss of customers *and* to obtain a substantial cash infusion to satisfy many of its obligations. The documentary evidence tendered in support of the economic rationale for the company's decision was considerable; Lauzon was thoroughly cross-examined on the matter. In short, the Board finds the decision to sell was not tainted by anti-union motive.

38. At this point, the Board should indicate that the *bona fides* of the decision to sell were examined solely as relevant to a consideration of alleged taint with respect to conduct by the company within Ontario. This Board has no authority to determine whether conduct outside Ontario constituted an unfair labour practice in another jurisdiction. (This limitation, of course, does not apply where a company which operates in Ontario seeks to avoid its statutory obligations by making decisions "outside" the province in a technical sense but then implementing those decisions in its Ontario operations). In the Board's view, impugned conduct which occurs outside Ontario may well be relevant as part of a "pattern of behaviour" in evaluating activities within this Province over which the Board does have jurisdiction.

39. Likewise, it is appropriate to stress that this Board has no jurisdiction to determine whether the company bargained in bad faith by not disclosing during collective bargaining its intention to sell the plant. Lauzon openly admitted that information had not been disclosed and justified that decision by pointing to numerous examples of improper conduct by the union and employees in the past to support the company's fear that, if there was disclosure, the plant would be occupied and the sale thwarted. The Board notes this evidence was not contradicted. However, whether the company's non-disclosure constituted bad faith bargaining and/or whether any relief should be ordered in the circumstances is not before this Board. What *is* before this Board is whether the non-disclosure could be regarded as evincing an anti-union animus in the sense outlined in the preceding paragraph. In the Board's opinion, it does not.

40. The Board must next evaluate the relocation exercise, that is, that the decision to sell was untainted but the choice of relocation site might have demonstrated an anti-union motive. The restrictions as to the purpose of this enquiry are as noted in the preceding paragraphs.

41. Lauzon testified as to the criteria used in the selection process (see paragraph 12 above). A number of sites in Quebec, Ontario and the United States were evaluated. In Quebec, Valleyfield (and its environs, including Coteau du Lac where a Dupont factory had previously been located) was mentioned in particular. On its face, Valleyfield did not satisfy the criteria (including location in relation to customers, suppliers and an international bridge) as fully as did the Cornwall site. Counsel for the applicant/complainant submitted that Valleyfield was not seriously considered as a possible relocation venue. (It was not disputed that, if the plant did relocate in Quebec, the Montreal collective agreement would apply.) However, the evidence does not substantiate this assertion. In the Board's view, the relocation criteria were reasonable and followed in selecting Cornwall. In reaching this conclusion, the Board makes no comment on the manner in which the Cornwall plant came to the company's attention (see paragraph 14). Notwithstanding the attendance by Lauzon and some other members of management at a party held by the union in the spring of 1985, the parties' relationship could hardly be described as positive. While the Board need not pass judgment on the relationship itself and the various actions of both sides, *per se*, one of the serious difficulties presented by this case has been the disentangling of indicia of an "eventful" relationship from indicia of anti-union animus. The indicia are clearly related but do not necessarily lead to the same conclusion.

42. The Board also must comment on the memo of Paul Ser Vaas to Dr. B. Ser Vaas dated September 10, 1985, listing the projected savings, advantages and disadvantages of the Cornwall

site. Much of the assessment of the site was unchallenged. Counsel for the applicant/complainant did closely question Lauzon about the projected savings related to reduction in work force and reduction in wages in particular. The anticipated reduction in work force has materialized because of the Cornwall plant design and equipment despite Cornwall's significantly greater production capability (see paragraphs 6, 9, and 24). Lauzon testified he had not compiled the figures in the memo but that the cost savings reflected a different labour market in the area. This account of a different labour market is partially corroborated by Barrette's evidence that the rates offered workers were generated from discussions with the Canada Employment Centre officials as to appropriate wage levels for the area and those rates were less than those in Montreal. The Board must be cautious in assessing whether anticipated savings in labour costs truly reflect a different labour market or reveal an improper desire to escape from collective bargaining obligations. However, the Board notes that, even where improper motive has been established, the jurisprudence has considered the possible penalizing effect of imposing a collective agreement negotiated in one context on operations elsewhere when considering the appropriate relief: *Westinghouse, supra*. In the circumstances, the Board is satisfied the respondent has adequately explained those items as unrelated to a desire to escape from the Montreal collective agreement. Indeed, in detailing the company's financial difficulties, Lauzon did not list a "rich" collective agreement as contributing to the firm's problems.

43. The Board concludes, on the evidence, that the selection of Cornwall as the relocation site was not tainted by improper motive.

Hiring of Temporary and Production Workers.

44. Paragraphs 15, 16, 17 and 18 outline the Board's findings as to the manner in which the Montreal employees learned of the closing through to the hiring of temporary employees and the letters from the Montreal workers in November as to their availability for employment in Cornwall. The Board need not comment on the events leading to the emptying of the employees' lockers and the alleged disappearance of some of those items; that question is before the Quebec courts. Nor does the Board intend to do other than note that the issue as to whether the company's conduct contravened the Montreal collective agreement is not before this Board either. The union filed a grievance in December 1985 and presumably those allegations will be decided in the appropriate forum. In this section, the Board first deals with the hiring of temporary and then production workers. It should be noted that the company referred to workers as temporary or permanent. The Board intends to clarify its terminology as appropriate.

45. Without repeating the facts in their entirety, Barrette utilized the Canada Employment Centre and ads in papers distributed locally to satisfy the company's need for temporary workers for its pre-production activities. The Board is satisfied with Barrette's explanation that it was neither sensible nor necessary to look beyond the local market in this regard. The temporary workers all signed employment letters explicitly attesting to their temporary status. That some may have hoped a permanent position might eventually materialize is not unusual. When the Montreal applications came to Barrette's attention, Lauzon was notified. His response that the applications were to be kept on file for the time being, while the company was still in its pre-production stage, does not reveal an improper motive particularly given the later instructions to Barrette to *first* consider the Montreal employees for production positions.

46. Lauzon testified that the company wanted skilled tradesmen in its maintenance department and, for this reason, did not consider the Montreal maintenance personnel as those Montreal workers had transferred from the production area over the years and were not suitably qualified for those jobs in the new plant. The Board is satisfied this explanation is credible and supported by

the evidence, including the applications of those hired as maintenance personnel. Moreover, the Montreal "maintenance" workers *were* to be considered for production positions at the Cornwall plant. This aspect need not be dealt with further.

47. In mid-February, Lauzon directed Barrette to fill the production positions and to first consider the Montreal workers. That evidence was not shaken on cross-examination and is consistent with events. A natural suspicion as to motive arises when a company seeks to interview or require applications from its former employees where the plant has been relocated. Generally, it may be assumed that the company is aware of the capabilities of its former employees so that no interview is needed. However, in these circumstances, the Board's concerns in this regard are satisfied. Firstly, it must be emphasized that Lauzon directed Barrette to interview the Montreal workers *before* turning to other applicants to fill any remaining positions. That is, the Montreal workers were *not* regarded in the same manner as persons "off the street". Moreover, as noted, the interviews were scheduled for the convenience of the Montreal workers in the Montreal offices of Quebec Travail. Secondly, there had been a considerable passage of time between the closure of the Montreal plant and the scheduled start-up of production in Cornwall coupled with the fact that, notwithstanding their applications for employment, a number of the Montreal workers had telephoned Lauzon to state that they were *not* interested in relocating. This testimony was not challenged on cross-examination. Thirdly, the employment conditions (hours, wages, etc.) were different in Cornwall, as was the production process, to some extent (e.g. no "finishers" were needed because of technological changes). (Whether those employment conditions subsequently were altered by the Board as a matter of law or its remedial authority is a separate issue.) In this regard, as well, the Board notes that the Montreal maintenance workers were being considered for production positions only as they did not possess the trades skills needed for the maintenance department in the Cornwall plant. At this juncture, the Board is focussing on the *motivation* of the company in scheduling individual interviews. For all the reasons just noted, the Board concludes that the company was entitled to interview the Montreal workers for the production positions at the Cornwall location. The evidence does not support a finding that the company sought to ignore relevant hiring criteria or impose irrelevant hiring criteria or institute a hiring process which would militate against the employment of union members: cf. *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193; *Sunnylea Foods Ltd.*, *supra*; *Culverhouse Foods Inc.*, [1977] OLRB Rep. Jan. 16; *Jimmy's II*, [1977] OLRB Rep. Sept. 572. The Board finds no anti-union animus in that interview process. (The hiring process is considered in the context of the alleged violations of 64 and 67 *infra* at 53.)

48. Paragraph 21 details the union's conduct in thwarting the interview process notwithstanding Barrette's repeated attempts to explain the sequence of events and Dube's approval of the procedure. Barrette testified as to J. Fournier's statements of the union position that the company must interview the Montreal workers collectively and transfer the employees as a group to Cornwall. Barrette's account was not seriously challenged on cross-examination *nor* did J. Fournier testify to modify or contradict that evidence. In its letter of March 6, 1986, tendered in evidence, the union characterized those events quite differently. However, as the union called no evidence (except as to trade union status) to contradict Barrette's unshaken testimony, the letter has no evidentiary weight except as to an assertion of the union's position. That is, the letter has no probative value as to the proof of its contents. Barrette immediately informed Lauzon of the events and was then instructed by Lauzon to fill the needed positions by advertising locally for workers utilizing the services of the Canada Employment Centre and considering the temporary workers.

49. To this point, the Board does not regard the company's conduct as tainted by improper motive. Nonetheless, the Board must still consider the effect of the February 24 meeting of the reclassification committee. That is, a company is not entitled to "seize upon" an excuse (in this

case, the union's conduct in thwarting the interviews) to cloak a tainted decision not to hire union members. As noted in paragraph 23, according to the minutes, Barrette was to ascertain whether the company was still interested in considering the Montreal workers and the employee representatives to ascertain whether the Montreal employees would be willing to be interviewed individually. This aspect is very troubling because the document was tendered in evidence by the applicant/complainant and was clearly within the applicant/complainant's knowledge given the composition of the committee but was *not* particularized initially or put to either Lauzon or Barrette. Barrette testified he followed Lauzon's instructions to fill the production positions locally, including the temporary workers where appropriate, and that, to his knowledge, no further interviews were held. Lauzon testified that the company concluded the union had thwarted the interview process and was insisting on the relocation of all Montreal employees. This explanation was set out in the company letter of March 6, 1986, sent to the Montreal workers. This explanation is *not inconsistent* with a further assessment of the company's position after a follow-up by Barrette as a result of the February 24 reclassification committee meeting. Lauzon was not asked whether the company reconsidered the matter and the grounds for not rescheduling interviews. Indeed, the Board has no evidence as to whether Barrette did inform Lauzon of the February 24 meeting or whether the Montreal employees agreed to individual interviews. Moreover, in the union's response (also dated March 6) to the company's March 6 letters, the union continued to assert that the company was in breach of the Montreal collective agreement in not using the Montreal employees in the Cornwall plant but did not affirm that those employees were willing to be interviewed individually as *per* the February 24 meeting. (The letter also sought to justify the union's conduct at the interviews.) The union led no evidence with respect to the February 24 meeting; the matter was not put to the company's witnesses. Even assuming the *minutes* may be taken as proved as to their contents, it is not a reasonable inference from that document that the company refused to reschedule interviews because of anti-union animus. That is, in the circumstances, the Board regards the company's conduct as reasonable, particularly given the union's continued insistence on hiring in accordance with the Montreal collective agreement. The Board is not prepared to conclude solely from the fact that interviews were not re-scheduled that the company violated sections 66 or 70 of the Act.

50. In considering the sequence of events, the Board has been mindful that the company bears the onus, under section 89(5) of the *Act*, of demonstrating that its decisions were entirely free from anti-union animus or improper motive. The Board need not cite the myriad number of cases to that effect but simply refers to Sack and Mitchell, *Ontario Labour Relations Board Law and Practice*, chapter 8. Counsel for the applicant/complainant in argument adverted to the "mobility rights" in section 6 of the *Charter of Rights and Freedoms*. It is sufficient on this aspect for the Board to note its conclusion that the Montreal workers were not discriminated against in respect of their applications for employment in Cornwall. Barrette's testimony that the company could satisfy the firm's need for temporary workers locally and that that was a sensible approach to filling the temporary positions goes to the issue of anti-union animus, not to discrimination contrary to section 6 of the *Charter*. The Montreal workers *were* considered for production positions.

51. In summary, the Board finds that the company did not contravene sections 66 or 70 in hiring its temporary, maintenance or production employees for the Cornwall site. In reaching this conclusion, the Board has not ignored the fact that, apart from Lauzon, two non-bargaining unit employees (a chemist who then left the firm in February 1986 and a secretary) did relocate. The company's *bona fide* attempt to interview the Montreal workers for production positions and the union's conduct in preventing those interviews, however, negate any inference that the company was discriminating between Montreal personnel on the basis of their union membership. It should be added that the Board does not accept the applicant/complainant's contention that the hiring process was intended to chill organizing attempts at the Cornwall plant or to otherwise coerce or

intimidate its “local” hires from exercising their freedom to join a trade union, to participate in its lawful activities or exercise any other rights under the Act. There is no evidence to ground such an assertion.

52. The Board intends to deal briefly with the alleged illegal “lock-out” of the Montreal employees. To meet the statutory definition of a lock-out in section 1(1)(k) of the Act, two elements must be present, namely, employer action which has the effect of employees not working (e.g., closure, suspension of work, refusal to continue to employ) *and* a motive for the action, i.e., to compel or induce employees to refrain from exercising statutory rights or to agree to different employment conditions or union rights: *Humpty Dumpty Foods*, *supra*; *Livingston Transportation*, *supra*; *Harry Woods Transport*, *supra*; *Rondar Services*, *supra*. The Board finding that anti-union animus was absent in the decision to close, selection of relocation site, the consideration of the Montreal workers for production positions in Cornwall and the hiring of the Cornwall work force is also applicable to the alleged contravention of sections 72 and 75 (threatening an unlawful lock-out). In the circumstances the Board need not elaborate on the distinction in the jurisprudence between “revocable” and “irrevocable” employer decisions relative to an analysis of motive. The Board is satisfied with the propriety of the company’s motivation regarding the decisions relevant to the alleged contravention of sections 72 and 75. Accordingly, the Board finds that the company has not violated those sections of the Act.

53. The Board next deals specifically with the alleged violations of sections 64 and 67. Again, the absence of improper motive as found in the preceding paragraphs are relevant to this issue. The decision to sell and relocate in Cornwall was not tainted by anti-union animus. This was *not* a “runaway” shop to escape from the union and the collective agreement. The company continued to deal with the union in respect of the Montreal employees in the context of the Montreal operation. The company participated in the reclassification committee to reintegrate the Montreal workers into the labour market. It is accurate to state that the Montreal workers designated the union as their representative in the letters indicating their availability for work in Cornwall. However, in the Board’s view, this designation does *not* clothe the union with the representational rights protected by sections 64 and 67 of the Act in the circumstances of this case. That is, the union held bargaining rights under Quebec law *and* the decision to sell and relocate in Cornwall was untainted *and* the hiring process of the Cornwall work force was untainted. There was no company interference in the administration of the union or its right to organize the workforce in Cornwall. There are no allegations that the company has sought to persuade the Cornwall employees not to support a union or to support the intervener rather than the applicant. The Board has found the company’s conduct was not intended (and did not) chill the atmosphere in Cornwall to thwart an organizing campaign. Lauzon candidly testified that, perhaps apart from the initial stages, he did not expect the company would remain “union free”, to use his words. There was no interference with the bargaining rights actually held by the union, that is, in respect of the Montreal operation.

54. In the Board’s opinion, the company was under no obligation to grant voluntary recognition to the union in respect of the Cornwall location. Unless, by operation of law, the Montreal collective agreement covered the Cornwall operation (and the Board has found that it did not) or voluntary recognition was granted, the union is required to be certified in accordance with the Act in order to acquire bargaining rights. The Board finds that the company has not sought to interfere with the proper acquisition of such rights in Ontario. A poor collective bargaining relationship is relevant to consideration of improper motive for company conduct. But such evidence, including evidence of past union impropriety, is not conclusive. The Board must determine whether the company could be regarded as having intended to interfere with those union rights protected by the Act or whether there was direct and persuasive evidence of a legitimate business purpose rebutting

any inference of motive where the conduct on its face had a critical impact on trade union activity: *Silverwood Dairies Ltd.*, [1981] OLRB Rep. Mar. 321; *Skyline Hotels*, supra, *International Wallcoverings*, [1983] OLRB Rep. Aug. 1316. On balance and in all the circumstances, the Board finds that the respondent has not violated sections 64 and 67 of the Act.

55. As the Board has not found the company has contravened the Act, the Board need not deal with the question of the appropriate relief.

Certification Application

56. This section deals with the certification application by the applicant/complainant filed November 18, 1985; the intervention of the R.W.D.S.U. is considered *infra*. The applicant/complainant and respondent were in agreement as to the appropriate bargaining unit, namely, all employees of the respondent in the City of Cornwall, Ontario, save and except foremen, persons above the rank of foreman, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period. The Board notes that the agreement of the applicant to the "part-time/student" exclusion was conditional upon a record check confirming the presence of part-time employees, as so regarded by the Board, as at the application date. In the circumstances, the Board need not deal further with this matter.

57. Whether the Board looks to the membership support for the applicant/complainant as at the terminal date or defers consideration of that support to a date when a representative work force would be present, that is, at the production stage in the spring of 1986 (see *Woodbridge Foam Corporation*, [1985] OLRB Rep. Jan. 139; *Marley Roof Tiles Limited*, [1984] OLRB Rep. March 511), the result is the same. Given the Board's finding that the process of hiring temporary, maintenance and production workers was not contrary to the Act, the applicant/complainant has not demonstrated sufficient membership support for certification or entitlement to a representation vote. Indeed, the applicant/complainant's certification application is predicated on a finding that, apart from the alleged improper employer conduct, there would have been sufficient support either for outright certification pursuant to section 7(2) (that is, greater than 55% membership support) or pursuant to section 8 of the Act. As the Board has not upheld the alleged violations, the applicant is not entitled to certification pursuant to section 7(2) or 8 and, therefore, the application must be dismissed. The Board adds that section 7(3) does not afford an alternative route to certification but must be read in the context of sections 7(1) and (2). Having failed to establish the requisite membership support in respect of employees in the bargaining unit, either under s.7(2) or 8, the applicant/complainant is not entitled to certification under the Act.

Intervention

58. As of April 11, 1986, the intervener RWDSU filed an intervention seeking certification for the Cornwall employees. Pursuant to section 103(3)(b), the Board at the time deferred consideration of that application pending a final decision on the original application. That original application has been dismissed by the Board, for the reasons already given. In its intervention, the RWDSU sought certification in respect of the following bargaining unit: all employees of the respondent in the City of Cornwall, Ontario, save and except foremen, persons above the rank of foreman, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period. To date, the certification application has not been posted or otherwise considered. Accordingly, the Board hereby directs the Registrar to process the certification application of the RWDSU in the usual manner.

Summary

59. In conclusion, for the foregoing reasons, the Board

(i) dismisses the alleged violations of section 89 of the Act;

(ii) finds the applicant/complainant does not hold bargaining rights in respect of the respondent's Cornwall location and the "Montreal" collective agreement does not cover that location;

(iii) dismisses the applicant/complainant's certification application both with respect to sections 7(2) and 8 of the Act;

(iv) directs the Registrar to proceed in the usual manner with the processing of the certification application by the intervener RWDSU.

2795-84-U United Steelworkers of America, Complainant, v. Shaw-Almex Industries Limited, Respondent, v. Group of Employees, Interveners

Charter of Rights and Freedoms - Duty to Bargain in Good Faith - Interference in Trade Unions - Strike - Unfair Labour Practice - Employer taking position in bargaining that striking employees would only be recalled to work in order of seniority as vacancies arose - Employer's preference for maintaining strike replacements discriminating against striking employees - Violation of ss.15, 64 and 66 - Employer having right to raise objection to reverse onus provision in Act as being contrary to s.15 of Charter - Distinction in reverse onus provision between employers and individuals who are not employers not contrary to s.15 of Charter

BEFORE: *Harry Freedman*, Vice-Chairman, and Board Members *R. J. Gallivan* and *J. Kennedy*.

APPEARANCES: *Brian Shell*, *Homer Seguin*, and *Norm Carriere* for the complainant; *Michael Gordon*, *Randolph S. Kinghorne*, and *John Shaw* for the respondent; *Michael Horan* for the interveners.

DECISION OF VICE-CHAIRMAN HARRY FREEDMAN; December 22, 1986

I

1. All of the employees of the respondent in the bargaining unit represented by the complainant that were employed on April 22, 1983 commenced a lawful strike against the respondent on that date. Shortly after that date, the respondent hired new employees to replace its striking employees in order to continue operations. That strike has continued, as of the last day of hearing in this matter, in February, 1986, for almost three years. This is a complaint that principally arises out of the bargaining that took place between the complainant and respondent at the end of 1984. It alleges that the respondent violated sections 15, 64 and 66 of the *Labour Relations Act* by taking the position in bargaining that the striking employees would only be recalled to work in order of seniority as vacancies arose and then by subsequently withdrawing its outstanding monetary proposal to the complainant when its offer had not been accepted.

2. On December 12, 1984 the complainant had purported to accept all of the elements of the respondent's offer made to it on December 11th, 1984 except the return to work provision referred to above. The complainant was concerned that the striking employees, all of whom had more than two years seniority when the strike began, and some of whom had more than fifteen years seniority at that time, might never be recalled because the respondent had hired new employees to replace the striking employees during the strike and had been operating throughout the strike.

3. This complaint was filed with the Board in January, 1985. As a result of the illness of a principal witness in this matter, the first hearings did not take place until May 1985, with the hearings before this panel of the Board commencing in June, 1985. This matter consumed thirteen days of hearing scheduled over nine months, with the hearing concluding on February 13, 1986. Most of the evidence in the hearing related to one and one-half days of bargaining between the respondent and complainant on December 11, and the morning of December 12, 1984.

II

4. Before reviewing the factual and legal issues that arise in this complaint, we make the following preliminary observation. It became apparent to us during the hearing that the parties' bargaining conduct graphically illustrated the danger Professor Archibald Cox described in the following passage in "The Duty to Bargain in Good Faith", (1958), 71 Harv. L. Rev. 1401 at 1440, that might result from labour board review of collective bargaining:

"There is also a danger that the regulation of collective bargaining procedures may cause negotiators to bargain with a view toward making the strongest record for NLRB scrutiny. The report of the Truitt negotiations bears ample evidence of the jockeying of lawyers [*Truitt M.F.G. Co.*, 110 N.L.R.B. 856]. Hammering out a labour agreement requires all the negotiator's skill and attention. To divert them from the main task by putting a value on building up or defeating an unfair labour-practice case diminishes the likelihood that the negotiations will be successful."

5. The complainant and respondent were distrustful and suspicious of one another. Homer Seguin, a Regional Representative of the complainant and the complainant's spokesman during the negotiations in December 1984, Johnathan Shaw, the respondent's official responsible for sales and marketing of the respondent's products in Asia, communications and labour relations, and James Heather, a labour relations consultant retained by Mr. Shaw at the time the strike commenced to assist in collective bargaining, all testified to that effect. The complainant suspected that the respondent was bargaining with a view to getting rid of complainant as the employees' bargaining agent, while the respondent felt, not unreasonably, that unfair labour practice charges would be filed with the Board if the complainant followed its previous pattern of filing new unfair labour practice complaints after every time the parties met in bargaining from the commencement of the strike in 1983.

6. Mr. Seguin testified that when he spoke in early December 1984 with Doris Shaw, a principal of the respondent and Mr. Shaw's mother, she advised him that Johnathan Shaw was the respondent's official who dealt with labour relations and that Mr. Heather was the respondent's advisor and spokesman. She also told Mr. Seguin that because of the complainant's charges, the respondent was very careful about anything it said to the complainant.

7. The air of mutual distrust and suspicion was not dispelled prior to, during the bargaining meetings of December 11th and 12th, or afterwards. Indeed, the complainant purported to accept the respondent's offer except for the back to work proposal in order to find out whether the respondent was acting in the way the complainant suspected. Mr. Seguin testified in his examination in chief that the bargaining committee was quite agitated about the discussions that had taken

place in the afternoon of December 11th. Mr. Seguin told the complainant's bargaining committee that there should be more discussion with the respondent to see "if we were right about the company being on a union busting binge" or to try and settle the strike even if it hurts. Mr. Seguin asked Mr. Heather for a written proposal. When Mr. Heather presented that proposal to the complainant that evening, Mr. Heather commented that it may be exhibit #1. Mr. Heather testified that it was a facetious comment based on what had taken place in bargaining up to that point. Mr. Heather was concerned that every time the parties sat down to bargain, they ended up before the Board in another unfair labour practice proceeding. Mr. Heather also testified that his concern was justified since these proceedings were also commenced after the bargaining that took place between the parties in December.

III

8. The portion of the complaint alleging that the respondent violated sections 64 and 66 in particular make section 89(5) of the Act applicable to the claims that the respondent dealt with its striking employees contrary to the Act in respect of their employment, opportunity for employment or conditions of employment. Counsel for the respondent submitted that section 89(5) of the *Labour Relations Act* was of no force or effect because it was contrary to section 15(1) of the *Constitution Act, 1982*, of which the *Canadian Charter of Rights and Freedoms* is a part.

9. In our view, it is appropriate and, indeed, may be incumbent on the Board for it to deal with an argument that a statutory provision affecting the Board's jurisdiction or its procedures is contrary to some provision of the Constitution. See *Third Dimension Manufacturing Ltd.* [1983] OLRB Rep. Feb. 261; *Constellation Hotel Corporation Ltd.*, [1983] OLRB Rep. March 335; *Knob Hill Farm Ltd.*, [1983] OLRB Rep. July 1087; *Sault College of Applied Arts and Technology*, [1985] OLRB Rep. Aug. 1293. Section 52(1) of the *Constitution Act, 1982* provides:

"The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

In exercising its powers and performing its duties conferred or imposed on it by statute the Board must act in accordance with the law. If we are persuaded that a provision of the *Labour Relations Act* is inconsistent with the Constitution of Canada, then we are obliged by section 52(1) not to give any force or effect to the inconsistent provision. In doing so, we are merely applying the law as we understand it. In this circumstance, we need not exercise the power conferred by section 24 of the *Charter*. See *Regina v. Big M Drug Mart Limited*, (1985), 18 D.L.R. (4th) 321 (S.C.C.).

10. While addressing ourselves to the *Charter* issues raised by counsel, it is also important to bear in mind the admonition of the Ontario Court of Appeal in *Service Employees International Union, Local 204 v. Broadway Manor Nursing Home* (1984), 48 O.R. (2d) 225; 13 D.L.R. (4th) 220, where the Court wrote at page 249 (O.R.):

"Having regard to our interpretation of s.13 of the Act, no Charter issue arises. In *Law Society of Upper Canada v. Skapinker*, a judgment of the Supreme Court of Canada, released May 3, 1984, and as yet unreported [since reported 9 D.L.R. (4th) 161, 11 C.C.C. (3d) 481, 8 C.R.R. 1983], Estey J. stated at p. 181:

"The development of the Charter as it takes its place in our constitutional law, must necessarily be a careful process. Where issues do not compel commentary on these new Charter provisions, none should be undertaken."

In the circumstances, it would not be appropriate for us to express any opinion on the Charter issues considered in the court below."

In our respectful view, the Court's approach is particularly applicable to the Board in respect of constitutional issues. Those issues ought to be dealt with by us only when it is necessary to do so because it is the Board's principal function to determine labour relations issues, not matters of general law or constitutional law.

IV

11. During argument, the Board questioned counsel for the respondent as to whether section 15 of the *Charter* had any application to this proceeding since the complaint was filed before April 17, 1985, the date that section 15 of the *Charter* came into force. We are now satisfied that section 15 of the *Charter* does apply to this proceeding.

12. Section 89(5) of the *Labour Relations Act* provides that the burden of proof is on the employer to affirmatively establish that it did not violate the Act in respect of the allegations that are set out in that subsection. That burden can only become relevant when the Board weighs the evidence at the end of the hearing. (See *ICB Warehousing, division of Alla're-Anson*, [1976] OLRB Rep. Oct. 621 at 632.) While the Board has referred to section 89(5) in determining the order of proceedings before it as section 89(5) deals with the burden of proof, it can only be of concern to the Board when engaging in its decision-making. Since the hearings in this matter concluded in February, 1986, after section 15 of the *Charter* came into force, the Board's reliance on section 89(5) of the *Labour Relations Act* in this proceeding took place when section 15 of the *Charter* was in force. Therefore, we are satisfied that the validity of section 89(5) of the *Labour Relations Act* is subject to section 15 of the *Charter* in this case.

13. The reversal of the burden of proof is not ordinarily a factor in the Board's decision-making process. That is, the Board weighs the evidence presented during the course of the hearing, makes findings of fact based on the evidence, draws reasonable inferences from those facts and then reaches a conclusion with respect to the factual issues presented. Recourse is had to the burden of proof where the evidence is so evenly balanced that the Board cannot decide on the balance of probabilities what the resolution of the factual issues ought to be. This process was described in *The Barrie Examiner*, [1975] OLRB Rep. Oct. 745 where the Chairman of the Board at that time wrote at page 748:

"... The onus of proof only comes into play after the trier-of-fact has found the evidence to be so evenly balanced that no clear conclusion can be drawn. See *Robins v. National Trust Co. Ltd.*, [1927] 2 D.L.R. 98 (J.C.P.C.). In this situation, the trier-of-fact must then fall back upon the rule relating to the location of the onus of proof, and make an evidential finding against the party upon whom the burden rests. Rules as to the onus, therefore, are rules of evidence, establishing a procedure to be followed where the evidence of two opposing parties is evenly balanced. Support for this conclusion can be found in *R. v Krumps*, [1931] 3 D.L.R. 767 (Man. C.A.); dicta to the same effect can be found in *Attorney General v. Halliday*, [1866-67] U.C.Q.B. 397 and *Sanders v. Malsbury*, (1882), 1 O.R. 178...."

14. This approach was recently adopted by the Board in *R. P. K. C. Holding Corporation*, [1986] OLRB Rep. June 828 where the Board wrote:

"As noted above, Mr. Filion also argued that section 89(5) of the Act offends section 15(1) of the Charter. However, in the circumstances of this case, we find it unnecessary to deal with that argument. As noted by the Board in paragraph 8 of *Knob Hill Farms Limited, supra*, section 89(5) 'is only triggered where there is no evidence before the Board or where the evidence before the Board is equally balanced.' Neither of those situations obtains in the instant case. Thus, it has been unnecessary for us to apply section 89(5) in deciding the Union's section 89 complaint."

15. Counsel for the respondent submits that the Board must decide at the outset of its deci-

sion-making where the burden of proof lies. Counsel argued that the Board rarely explicitly invokes the reverse onus under section 89(5), but nevertheless may rely on it during its decision-making. Counsel submitted that unless the Board was prepared to say that it would not have regard to the reverse onus under section 89(5) if the Board found against the respondent, it and its counsel would not know whether an unconstitutional law was used by the Board in reaching its decision.

16. While we do not accept counsel's submission as to *when* the Board must decide where the legal burden of proof lies, we have found it necessary in this case to deal with the validity of section 89(5) of the *Labour Relations Act* in weighing the evidence that was presented to us since we have resorted to it in making some of our determinations. In doing so, we of course recognize that there is technically a mixed burden of proof with respect to the issues before us in this proceeding. We are aware of the allegations that give rise to the shifting of the burden of proof under section 89(5), and those that do not. We appreciate that there may be factual issues, and in particular, findings of fact based on inferential reasoning that may be affected by section 89(5) of the Act.

17. In the *Barrie Examiner* case, *supra*, the Board discussed the process of inferential reasoning that must often be used in cases where section 89(5) of the Act is applicable, although not necessarily relied upon, at pages 747-749:

"The location of the onus of proof is an important consideration in cases such as this one. The reasons, or reason, behind the discharge of an employee occurring in the context of union activity are best determined by an examination of the objective circumstances surrounding the discharge. In other words, the circumstantial evidence surrounding the discharge must be examined and inferences drawn from that evidence. There are two competing inferences that can be drawn - either that the discharge was motivated by an anti-union animus or that the discharge was for some reason totally unrelated to the presence of union activity at or around the time of discharge. The Board must determine which of the two inferences is the more probable. In many cases, however, often because of the unsatisfactory nature of the evidence, it may be difficult to draw either inference with much certainty. In such cases, where the evidence is equally balanced, a decision can only be rendered by resorting to the onus of proof. Since neither party can establish a case on the balance of probabilities, the case can only be determined by deciding against the party upon whom the burden of proof rests. ...

What then is the extent of the burden of proof that has been shifted by statute to the respondent? The Act speaks of the burden of proof 'that any employer ... did not act contrary to this Act'. In its earlier decisions, this Board has stated that, even if only one of the reasons for a discharge related to union activity, the discharge would nevertheless constitute a violation of the Act. For a review of this jurisprudence, see *Delhi Metal Products Ltd.*, [1974] OLRB Rep. July 450. In other words, the appearance of a legitimate reason for discharge does not exonerate the employer, if it can be established that there also existed an illegitimate reason for the employer's conduct. This approach effectively prevents an anti-union motive from masquerading as just cause. Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts - first, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred."

V

18. Counsel for the respondent argued that section 89(5) contravenes section 15 of the *Canadian Charter of Rights and Freedoms* because section 89(5) imposes a burden of proof that would not otherwise exist only on employers that are alleged to have engaged in certain conduct contrary to the *Labour Relations Act*, but not on persons or organizations who are not employers that are alleged to have violated the Act. Since section 15 provides that every individual is equal

before and under the law and has the right to equal protection and benefit of the law without discrimination, section 89(5) of the *Labour Relations Act*, which applies only to a division or class of individuals who are employers, discriminates between members of that class, that is, employers and all other individuals who are subject to the *Labour Relations Act* by imposing the burden of proof to establish that persons in that class did not violate the *Labour Relations Act* and by not imposing that burden on others who are subject to the *Labour Relations Act*. The right of employers, counsel submitted, to equal protection and benefit of the law has been abrogated by section 89(5) since it imposes the obligation on employers to prove that they did not engage in conduct contrary to the Act while any person who is not an employer can require the complaining party to prove its case. Thus, there is a *prima facie* violation of section 15 of the Charter that is not saved by section 1 of the Charter.

19. Section 15(1) of the Charter provides:

"Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

Counsel for the complainant contended that the respondent in this case is not an individual, but is a corporation and therefore does not have the status to plead that section 89(5) of the Act is discriminatory since corporations do not have any rights that are conferred by section 15. In our opinion, the respondent, while not an individual, does have standing to raise the argument that any law that affects it is unconstitutional although none of the rights conferred expressly on it by the Constitution have been violated.

20. We accept that corporations have not been given the rights that are conferred on individuals by section 15. See *Hogg, Constitutional Law of Canada*, 2nd edition, at pages 667 and at 798:

"Section 15 confers its equality rights on 'every individual'. This is a more specific term than 'everyone', 'any person' or 'anyone', and it probably excludes a corporation, at least in the context of an instrument which also contains the more general terms. The word 'individual' was substituted for 'everyone' during the legislative history of s.15. The only purpose of this change could be to deny equality rights to corporations, an intelligible purpose having regard to national economic policies regarding investment, banking and energy that discriminate against corporations of foreign origin. ...

Section 15 applies to every 'individual'. The word 'individual' was substituted for 'everyone' during the legislative history. This change probably has the effect of denying equality rights to corporations."

Mr. Justice Strayer of the Federal Court, Trial Division, in *Smith, Kline and French Laboratories Limited v. Attorney General of Canada*, (1985), 24 D.L.R. (4th) 321 wrote at page 352:

"It is clear that the term 'individual' does not include bodies corporate. Therefore the corporate plaintiffs have no claim under paragraph 1(a) of the Canadian Bill of Rights."

and at page 365:

"For the same reasons as noted above in connection with paragraph 1(a) of the Canadian Bill of Rights, the corporate plaintiffs are not potentially within the protection of section 15 [of the Charter] because it applies only to 'every individual'."

See also *Aluminium Co. of Canada Ltd. v. The Queen*, (1986), 55 O.R. (2d) 522 (Div.Ct) and the

decision of Mr. Justice Hughes in *Arlington Crane Services Ltd. v. Minister of Labour*, unreported, May 27, 1986 where he wrote:

"No Canadian court so far pronouncing upon this section [section 15 of the Charter] in the case cited before me has found that the word 'individual' standing in relation to the specified grounds of discrimination can include a corporation. When used as a noun - as it is in section 15(1) - it must lexicographically refer only to a single human being and it is clear that by using this word Parliament sought to avoid 'every person' which must have included a corporation and 'every one', which might have done."

21. Nevertheless, if the law is unconstitutional, it is unconstitutional for everyone, not just for persons whose rights have been violated. This was the view of the Supreme Court of Canada of a similar argument made in *Regina v. Big M Drug Mart Ltd.*, *supra*, where the court wrote at page 399-401:

"Standing and jurisdiction to challenge the validity of a law pursuant to which one is being prosecuted is the same regardless of whether that challenge is with respect to ss. 91 and 92 of the *Constitution Act, 1867* or with respect to the limits imposed on the Legislatures by the *Constitution Act, 1982*.

Section 24(1) sets out a remedy for individuals (whether real persons or artificial ones such as corporations) whose rights under the Charter have been infringed. It is not, however, the only recourse in the face of unconstitutional legislation. Where, as here, the challenge is based on the unconstitutionality of the legislation, recourse to s.24 is unnecessary and the particular effect on the challenging party is irrelevant.

Section 52 sets out the fundamental principle of constitutional law that the Constitution is supreme. The undoubted corollary to be drawn from this principle is that no one can be convicted of an offence under an unconstitutional law. The respondent did not come to court voluntarily as an interested citizen asking for a prerogative declaration that a statute is unconstitutional. If it had been engaged in such 'public interest litigation' it would have had to fulfil the status requirements laid down by this Court in the trilogy of 'standing' cases (*Thorson v. A.G. Can. et al. (No. 2)* (1974), 43 D.L.R. (3d) 1, [1975] 1 S.C.R. 138, 1 N.R. 225; *Nova Scotia Board of Censors v. McNeil* (1975), 55 D.L.R. (3d) 632, [1976] 2 S.C.R. 265, 32 C.R.N.S. 376; *Minister of Justice of Canada et al. v. Borowski* (1981), 64 C.C.C. (2d) 97, 130 D.L.R. (3d) 588, [1981] 2 S.C.R. 575, but that was not the reason for its appearance in court.

Any accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid. Big M is urging that the law under which it has been charged is inconsistent with s.2(a) of the Charter and by reason of s.52 of the *Constitution Act, 1982*, it is of no force or effect.

Whether a corporation can enjoy or exercise freedom of religion is therefore irrelevant. The respondent is arguing that the legislation is constitutionally invalid because it impairs freedom of religion - if the law impairs freedom of religion it does not matter whether that company can possess religious belief. An accused atheist would be equally entitled to resist a charge under the Act. The only way this question might be relevant would be if s.2(a) were interpreted as limited to protecting only those persons who could prove a genuinely held religious belief. I can see no basis to so limit the breadth of s.2(a) in this case.

The argument that the respondent, by reason of being a corporation, is incapable of holding religious belief and therefore incapable of claiming rights under s.2(a) of the Charter, confuses the nature of this appeal. A law which itself infringes religious freedom is, by that reason alone, inconsistent with s.2(a) of the Charter and it matters not whether the accused is a Christian, Jew, Moslem, Hindu, Buddhist, atheist, agnostic or whether an individual or a corporation. It is the nature of the law, not the status of the accused, that is in issue. As Mr. Justice Laycraft observed in the Alberta Court of Appeal at pp. 320-1 C.C.C., p. 131 D.L.R., p. 636 (W.W.R.):

'The task of the court is to see whether all or part of the *Lord's Day Act* is inconsistent with freedom of conscience and religion and therefore of no force or effect. It

does not affect that task that a person charged has no religion or even that he has no feelings of conscience.'

Mr. Justice Cartwright, dissenting in *Robertson and Rosetanni v. The Queen*, [1964] 1 C.C.C. 1, 41 D.L.R. (2d) 485, [1963] S.C.R. 651, though not in conflict with the majority of the court on this point, stated at p. 4 C.C.C. pp. 488-9 D.L.R., p. 661 S.C.R.:

'It was argued that, in any event, in the case at bar the appeal must fail because there is no evidence that the appellants do not hold the religious belief that they are under no obligation to observe Sunday. In my view such evidence would be irrelevant. The task of the Court is to determine whether s.4 of the Act infringes freedom of religion. This does not depend on the religious persuasion, if any, of the individual prosecuted but on the nature of the law. To give an extreme example, a law providing that every person in Canada should, on pain of fine or imprisonment, attend divine service in an Anglican church on at least one Sunday in every month would, in my opinion, infringe the religious freedom of every Anglican as well as that of every other citizen.'

As the respondent submits, if the legislation under review had a secular purpose and the accused was claiming that it interfered with his religious freedom, the status of the accused and the nature of his belief might be relevant: it is one thing to claim that the legislation is itself unconstitutional, it is quite another to claim a "constitutional exemption" from otherwise valid legislation, which offends one's religious tenets.

In my view, there can be no question that the respondent is entitled to challenge the validity of the *Lord's Day Act* on the basis that it violates the Charter guarantee of freedom of conscience and religion."

22. Therefore, we are satisfied that the respondent is entitled to claim that section 89(5) of the *Labour Relations Act* is contrary to the Constitution of Canada on the basis that it conflicts with section 15 of the *Charter*.

VI

23. Having decided that the respondent can assert the claim that section 89(5) violates section 15 of the *Charter*, we must analyze section 15 in order to determine whether individuals who are employers are, as employers, "equal before and under the law" or if individuals, when acting as employers, have "the right to equal protection and equal benefit of the law without discrimination."

24. In approaching this interpretation issue, we must keep in mind the following statements of the Supreme Court of Canada. In *Hunter v. Southam*, (1984), 11 D.L.R. (4th) 641 the Court wrote at 649-651:

"The need for a broad perspective in approaching constitutional documents is a familiar theme in Canadian constitutional jurisprudence. It is contained in Viscount Sankey's classic formulation in *Re s.24 of B.N.A. Act; Edwards v. A.G. Can.*, [1930] 1 D.L.R. 98 at pp. 106-7; [1930] A.C. 124 at pp. 136-7; [1929] 3 W.W.R. 479, cited and applied in countless Canadian cases.

'The B.N.A. Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada....

Their Lordships do not conceive it to be the duty of this Board - it is certainly not their desire - to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation...'

More recently, in *Minister of Home Affairs et al. v. Fisher et al.*, [1980] A.C. 319 at p.329, dealing with the Bermudian Constitution, Lord Wilberforce reiterated that a constitution is a docu-

ment '*sui generis*, calling for principles of interpretation of its own, suitable to its character', and that as such, a constitution incorporating a *Bill of Rights* calls for [at p.328]: 'a generous interpretation avoiding what has been called 'the austerity of tabulated legalism' suitable to give to individuals the full measure of the fundamental rights and freedoms referred to'. Such a broad, purposive analysis, which interprets specific provisions of a constitutional document in the light of its larger objects, is also consonant with the classical principles of American constitutional construction enunciated by Chief Justice Marshall in *M'Culloch v. State of Maryland* (1819), 17 U.S. 316 (4 Wheaton). It is, as well, the approach I intend to take in the present case.

I begin with the obvious. The *Canadian Charter of Rights and Freedoms* is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action. In the present case this means, as Prowse J.A. pointed out, that in guaranteeing the right to be secure from unreasonable searches and seizures, s.8 acts as a limitation on whatever powers of search and seizure the federal or provincial governments already and otherwise possess. It does not in itself confer any powers, even of 'reasonable' search and seizure, on these governments. This leads, in my view, to the further conclusion that an assessment of the constitutionality of a search and seizure, or of a statute authorizing a search or seizure, must focus on its 'reasonable' or 'unreasonable' impact on the subject of the search or the seizure, and not simply on its rationality in furthering some valid government objective.

Since the proper approach to the interpretation of the *Canadian Charter of Rights and Freedoms* is a purposive one, before it is possible to assess the reasonableness or unreasonableness of the impact of a search or of a statute authorizing a search, it is first necessary to specify the purpose underlying s.8: *in other words, to delineate the nature of the interests it is meant to protect.*"

[emphasis added]

25. The Court later expanded on the proper approach to interpreting the *Charter* in *Regina v. Big M Drug Mart Ltd.*, *supra*, at 423-424:

"This Court has already, in some measure, set out the basic approach to be taken in interpreting the Charter. In *Hunter et al. v. Southam Inc.* (decision rendered September 17, 1984) [since reported 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, [1984] 2 S.C.R. 145] this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the *purpose* of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.

In my view, this analysis is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker* (1984), 11 C.C.C. (3d) 481, 9 D.L.R. (4th) 161, [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts."

26. Using the approach to the interpretation of the *Charter* that the Supreme Court of Canada has adopted, we must examine the rights guaranteed by section 15 of the *Charter* by reference to the purpose of the guarantee. We must divine the purpose of section 15 from the "interests it was meant to protect." These interests are to be determined by an examination of "the character and larger objects of the *Charter*... the language chosen to articulate the specific right or freedom,... the historical origin of the concepts enshrined, and where applicable,... the meaning and

purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*.”

27. Section 15 guarantees an equality right for individuals. While anyone may resist the application of an unconstitutional law by reason of section 52(1) of the *Constitution Act*, it still remains to be determined whether individuals who are employers are a class, the unequal treatment of which is contrary to section 15 of the *Charter*. In this regard, it is useful to refer to the following comments of Howland, C.J.O. and Robins, J.A. in their minority judgment in the *Education Reference*, (1986), 53 O.R. (2d) 513 at 554:

“In our view, s.15(1) read as a whole constitutes a compendious expression of a positive right to equality in both the substance and the administration of the law. It is an all-encompassing right governing all legislative action. Like the ideals of ‘equal justice’ and ‘equal access to the law’, the right to equal protection and equal benefit of the law now enshrined in the Charter rests on the moral and ethical principle fundamental to a truly free and democratic society that *all persons should be treated by the law on a footing of equality with equal concern and equal respect*.

This is not to suggest that s.15(1) requires that every person in every instance be treated in precisely the same manner. *There is no infringement of the section unless the unequal treatment is discriminatory*. Most laws provide for distinctions and prescribe different results based on those distinctions. Indeed, a State could not function without classifying its citizens for various purposes and treating some differently from others. As Mr. Justice Stewart pointed out in his discussion of the equal protection clause of the U.S. Fourteenth Amendment in *San Antonio School District v. Rodriguez* (1973), 411 U.S. 1 at p.60: ‘There is hardly a law on the books that does not affect some people differently from others.’ Similarly, although spoken in a different context, Chief Justice Dickson said at p.347 S.C.R., p. 362 D.L.R. of *Big M Drug Mart Ltd.*, *supra* ‘...the interests of true equality may well require differentiation in treatment’. This Court in *Re McDonald and The Queen* (1985), 51 O.R. (2d) 745 at p. 765, 21 D.L.R. (4th) 397 at p. 417, 21 C.C.C. (3d) 330, speaking through Morden J.A., accepted that ‘[i]t can reasonably be said, in broad terms, that the purpose of s.15 is to require that those who are similarly situated be treated similarly.’ This analysis is appropriate to the subject-matter of this reference and, so far as the issue arises, can aptly be applied. However, on the view we take of the relationship between s.15(1) and Bill 30, there is no need to consider either the various tests that have been developed to assess the legitimacy of particular statutory classifications or the various approaches that have been suggested with respect to the application of s.15(1): see Gold, ‘A Principled Approach to Equality Rights: A Preliminary Inquiry’, *supra*, at pp. 800-1; *Re McDonald and The Queen*, at pp. 763-5 O.R., pp. 415-7 D.L.R.

Section 15(1) forbids governments, in respect of all matters within their legislative authority, from denying to individuals, and similarly to groups of individuals, the equal protection and equal benefit of the law on a discriminatory basis. For greater particularity, the section enumerates specific prohibited grounds of discrimination. Not unexpectedly, religion is one....”

[emphasis added]

We are also assisted in our approach by the following analysis of Mr. Justice Strayer in *Smith, Kline & French Laboratories Ltd. v. A.G. Canada*, *supra*, at 367-369:

“A threshold problem in the application of s-s. 15(1) is to ascertain its relationship to s.1 of the Charter. Section 1 reads as follows:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

If an impugned legislative provision is not found to contravene the requirements of s-s. 15(1), then the question of the application of s.1 does not arise. If, on the other hand, a legislative provision is found *prima facie* to contravene s-s. 15(1), then the government or any one else

attempting to uphold the legislative provision, if it or he is to invoke s.1, has the onus of demonstrating that the restriction in question is reasonable, is clearly prescribed by law and is 'justified in a free and democratic society'. Thus, it can be of critical importance to know whether the impugned legislation *prima facie* conflicts with s-s. 15(1). If it does not, that is the end of the matter. But if it does, and if as in the present case the defendant seeking to uphold the legislation does not invoke s.1 by way of evidence or argument, then the legislative provision must be found invalid. This makes extremely important the breadth of s.15's prohibitions against any legislation which draws distinctions among citizens.

It appears to me that by its express references to certain forms of discrimination, namely, 'race, national or ethnic origin, colour, religion, sex, age or mental or physical disability', s-s. 15(1) is clearly intended to proscribe any distinctions based on those grounds. Any such distinctions, if they are to be defended, must be justified under s.1. It may be that distinctions based on certain grounds such as age may be more readily justified under s.1, but the onus must be on the defender of such a distinction even then.

With respect to other kinds of distinctions which may be made by legislation, *it appears to me that no such presumptions arises of discrimination and that it is necessary to analyze such distinctions more closely to determine whether they can be regarded as in conflict with s-s. 15(1). I do not think it could have been the intention that every distinction drawn by legislation between citizens or classes of citizens should automatically be regarded as 'discrimination' within s-s. 15(1) and thus immediately cause a shift in onus to a defender of the legislation to justify it under s.1. It is the business of legislatures to make distinctions for a myriad of reasons and it is inconceivable that every one of these should place on the government, or on any one else relying on such legislation, the onus of showing that it is 'justified in a free and democratic society'.* This would shift to the courts a decisional right and burden which would be unacceptable both to them and the legislatures.

One must therefore seek criteria to aid in determining whether a legislative distinction creates an inequality which is discriminatory, taking 'discrimination' to mean the kind of distinction prohibited by s-s. 15(1). It would not, I think, be appropriate to rely solely on tests commonly used with respect to the interpretation of para. 1(b) of the *Canadian Bill of Rights*, having regard to the more narrow scope of that provision and the statutory nature of the instrument in which it was found. I would, however, with respect adopt the language of McIntyre J. with whom Dickson J. concurred in *MacKay v. The Queen* (1980), 114 D.L.R. (3d) 393 at p.423, 54 C.C.C. (2d) 129, [1980] 2 S.C.R. 370 at p. 406 (also quoted, *supra*):

'The question which must be resolved in each case is whether such inequality as may be created by legislation affecting a special class - here the military - is arbitrary, capricious or unnecessary, or whether it is rationally based and acceptable as a necessary variation from the general principle of universal application of law to meet special conditions and to attain a necessary and desirable social objective.'

I would respectfully observe that in my view there is no magic in the concept of a 'class': it has no definition, provides no standard, but is merely a subjective concept. It can therefore not, by itself, be a basis for determining, when a 'class' is somehow created or divided legislatively, that discrimination exists. It appears to me that this was not the sense in which McIntyre J. made reference to a 'special class' and all I understand him to be saying is that if a certain number of people in society are treated differently there should be a rational basis for distinguishing between them and the rest of society."

[emphasis added]

28. In our view, that analysis provides the appropriate perspective to use in determining what "interests it [section 15] was meant to protect" and therefore enable us to decide whether the equality rights created by section 15 have been infringed by section 89(5) of the Act. In *Homemade Winecrafts (Canada) Ltd. v. Attorney General of British Columbia*, (1986), 26 D.L.R. (4th) 468 (B.S.S.C.), MacKay, J. in finding that a regulation prohibiting the sale of a particular product did not contravene section 15 of the *Charter* stated at page 471-472:

"As well McTaggart L.J.S.C. made mention of the legislative history of the drafting of the section. I assume he was referring to the fact that in the Proposed Constitutional Resolution of October, 1980, the non-discrimination protections were given to 'everyone'. The change, in my view, was to make it abundantly clear that the non-discriminatory protection afforded by s. 15 was directed at natural persons. Human dignity is what is sought to be enhanced and preserved - regardless of such personal characteristics as 'race, national or ethnic origin, colour, religion, sex, age or mental or physical disability'. To hold otherwise, would, in my view, lessen the high ideals enshrined in s. 15 of the Charter."

The Divisional Court in *Aluminium Co. of Canada Ltd. v. The Queen*, *supra*, expressed a similar opinion when it wrote at page 531:

"In my view, section 15 is restricted to the protection of individuals and does not apply to corporate entities. It is a part of the Charter that protects the dignity and worth of human beings against governmental intrusion that would make distinction between individuals based upon human attributes or characteristics."

29. For a distinction to be contrary to section 15 of the *Charter*, we believe that it must be based on some inappropriate ground. Mr. Justice Dea in *Cabre Explorations Ltd. v. Arndt*, (1986), 28 D.L.R. (4d) 747 (Alta. Q.B.) succinctly stated this test at 751:

"'Discrimination' as it appears in s. 15 of the Charter involves something more than simple choice. Such must be the situation at least in those cases where the grounds of discrimination as in this case are not grounds listed in the section itself. To find prohibited discrimination one looks for elements treating individuals belonging to certain groups differently from others based on criteria that are unfair or irrelevant."

In *Andrews v. Law Society of British Columbia*, (1985), 22 D.L.R. 4th 9, Mr. Justice Taylor wrote at page 16:

"Without attempting an exhaustive definition, I would say that the essence of discrimination for the present purpose is the drawing of an irrational distinction between people based on some *irrelevant personal characteristic* for the purpose, or having the effect, of imposing on certain of them a penalty, disadvantage or indignity, or denying them an advantage. Some of the personal characteristics which might form a basis for discrimination are listed in s.15(1), but I do not think this is intended as a complete listing."

[emphasis added]

30. The enumerated classifications or distinctions that are *prima facie* discriminatory within the meaning section 15 of the *Charter* are classifications or distinctions that are based principally on characteristics that relate to the physical, cultural, and spiritual attributes of human beings. While the enumerated distinctions set out in section 15 and other unenumerated distinctions between individuals that are similar in import may require section 1 of the *Charter* to justify their existence in legislation, it seems patent to us that a distinction between individuals because they are employers is far different. In our opinion, that type of distinction is what Mr. Justice Strayer was referring to in *Smith, Kline & French Laboratories Ltd., v. A.G. Canada*, *supra*. The distinction in section 89(5) of the *Labour Relations Act* between individuals that arises because an individual is an employer does not in any way limit or affect human dignity or worth nor is it based on the kind of human attributes that section 15 of the *Charter* protects. In any event, it appears to us that distinctions created by the *Labour Relations Act* between employers and persons who are not employers are not irrational, irrelevant or unfair. Therefore, we find that the distinction in section 89(5) of the *Labour Relations Act* between employers and other persons who are subject to the Act is a distinction that is not contrary to section 15 of the *Canadian Charter of Rights and Freedoms*.

31. Section 15 creates rights applicable to individuals, that is, human beings, by establishing

equality rights for individuals because they are individuals or belong to a class of individuals. We are satisfied that the distinction that section 89(5) of the Act creates for employers as a class within our society is not discriminatory and is therefore not a distinction to which section 15 of the *Charter* has any application. In view of our conclusion we expressly decline to comment on whether section 1 of the *Charter* provides justification for section 89(5) of the Act.

VII

32. The history of bargaining between the complainant and the respondent was fully set out in the Board's decision involving these parties dated October 10, 1984 (see *Shaw Almex Industries Limited*, [1984] OLRB Rep. Oct. 1502, at paragraphs 2-25.) To the extent that the bargaining history prior to October 1984 is relevant, there is no issue between the parties as to the propriety of this panel of the Board having regard to the findings described in that decision. The Board in that case, by a majority, W. F. Rutherford dissenting, found that while the positions taken by the respondent and its conduct for the most part during bargaining did not constitute a breach of the duty to bargain in good faith, the respondent's failure to respond to the complainant's proposal and to meet shortly after September 1983 did contravene section 15 of the *Labour Relations Act*. The Board wrote at paragraphs 30-31 of that decision:

"30. Having said all that, we must make it clear that we have carefully considered all of the evidence to determine whether the respondent's behaviour betrays a desire to avoid making a collective agreement. While we are not without our doubts about the motivation for some of the respondent's actions, on the evidence now before us we cannot find, on the balance of probabilities, that the respondent was not prepared to enter into a collective agreement or sought to avoid doing so. It has revealed, when asked, the terms of which it says it is prepared to agree. If the respondent has been bluffing, the union has not yet called its bluff.

31. We have found that the respondent failed to 'bargain in good faith and make every reasonable effort to make a collective agreement' in the period immediately following the meeting of September 26, 1983. We do not find the more extensive violation alleged by the complainant...."

33. As a result of the Board's decision, discussions ensued between the representatives of the parties to resume negotiations. Counsel for the complainant wrote the following letter to Mr. Heather:

"It was a pleasure talking with you this afternoon. I am writing to confirm my advice to you that in an effort to resolve all outstanding matters and in view of the direction from the Ontario Labour Relations Board contained in its recent decision involving the above-captioned parties, I advised you that henceforth Mr. Homer Seguin, Regional Representative, United Steelworkers of America, 92 Froot Road, Sudbury, Ontario P3C 4Z4, telephone (705) 675-2461 shall be the chief union spokesperson and negotiator.

I know that Mr. Seguin shall be available for the bargaining session which you and I discussed today. I am writing to confirm your advice that you do not think it would be any problem for a meeting to be scheduled within the next 'fortnight' and I shall make myself available to Mr. Seguin to be of whatever assistance is necessary to resolve this bitter and difficult situation.

I have asked Mr. Seguin to contact you directly to make arrangements for a bargaining session. I leave it to you and to Mr. Seguin to determine what assistance, if any, you desire from either of Mr. Illing or Mr. Skinner.

I can assure you that United Steelworkers of America shall continue to negotiate with the view to resolving the strike."

34. Mr. Heather, in attempting to arrange a meeting, wrote to Ray Illing, Director of Medi-

ation and Conciliation Services for the Ministry of Labour, and copied that letter to Mr. Seguin. That letter stated:

"This will serve to confirm that Shaw-Almex Limited will attend at your office for the purpose of an 'off the record meeting' in accordance with the description of such a meeting as set out by Mr. Patterson in his November 8, 1984 letter.

I have discussed this with Mr. Seguin, who has taken over this matter for the Steelworkers, and I look forward to a fruitful discussion.

As I indicated to you I will seek assurance from you that this meeting will fall into the category to which Mr. Patterson makes reference. Notwithstanding what has been indicated to the contrary, the July 9th meeting was referred to as one 'away from the bargaining table.'"

(The reference in Mr. Heather's letter to Mr. Patterson's letter of November 8, 1984, related to a letter from David Patterson, a Director of the complainant, to Mr. Illing. Mr. Patterson's letter was part of exhibit #33 in this matter.) The "off the record" meeting contemplated in Mr. Heather's letter was described in Mr. Patterson's letter as follows:

"We are both aware of the procedures and protocol employed by you when arranging and holding 'off the record meetings' to get things going in difficult situations. You have dealt with me on a number of occasions under some very difficult circumstances, and you are aware that I have always acted in an above board and straightforward manner.

Such meetings have, in the past, been useful in obtaining settlements for the parties and I look to you and your Minister to continue your efforts in this matter and will co-operate with you as we have in this and other occasions."

35. Mr. Seguin wrote to Mr. Heather in reply by letter dated December 7, 1984. That letter stated:

"I received a copy of your letter to Mr. Ray Illing dated December 3, 1984.

I was surprised that you are not communicating with me directly. At no time have you and I agreed that communications between us would be directed through Mr. Illing. Please call me if you would like to discuss this matter. I think you and I have enough experience in collective bargaining to talk to each other directly.

With respect to the terms which you appear to be setting for the upcoming meetings at Mr. Illing's office scheduled for December 11/84, if you are requiring that the meeting be on a 'without prejudice' basis, I am very concerned. At no time in your discussion with Mr. Shell or in subsequent discussions between you and me did you set or indicate any desire to set special conditions for the up-coming collective bargaining session.

I would appreciate it if you would confirm to me why it is we cannot have a normal collective bargaining session and try to work out a resolution of our differences. I am mindful of the direction of the Board in its recent decision. I can see no reason for the negotiations to be subject to special rules.

I am prepared to meet with you and Mr. Illing to discuss this matter and beyond it to resolve the labour dispute. We shall be prepared to negotiate non-stop until we achieve a settlement."

36. When Mr. Seguin spoke with Mr. Heather about the upcoming negotiation meeting, they discussed various concerns about the bargaining that had taken place. Mr. Seguin expressed the hope that as he was now taking over as spokesman, and had had a previous relationship with the principals of the respondent, a collective agreement could be reached. During that conversation, the suggestion that Mr. Seguin might speak to Mrs. Shaw was made.

37. Although Mr. Seguin thought that the negotiations would continue until a settlement of the contract was reached, there was no express agreement between the respondent and the complainant to continue negotiations beyond December 11, 1984. The parties did meet on that day. Mr. Shaw and Mr. Heather represented the respondent. Mr. Seguin was the spokesman for the complainant's bargaining committee. While most of the day was taken up with "off the record" discussions about which we received no evidence, there was evidence led that the parties met face to face at about 4:00 p.m. on that day. The complainant made a proposal to the respondent orally by which it reviewed the items still in dispute, withdrew its demand with respect to non-bargaining unit employees performing bargaining unit work, made proposals concerning wages and benefits, and proposed that all striking employees be returned to their jobs. There were some questions about the complainant's proposals. Mr. Seguin testified that he explained that the proposal on the recall of striking employees meant that all employees, both striking and non-striking employees would be placed on an equal footing, and then the employer would fill the positions in accordance with the collective agreement. While Mr. Seguin suggested that this could have resulted in some striking employees remaining on lay-off while employees hired since the strike began might continue working, we are satisfied that as of December 11, 1984, the complainant's position with respect to the recall of the striking employees, as understood by the respondent, was that no strike replacement employees could remain at work while any employees who had engaged in the strike were on lay-off.

38. The respondent retired to consider the union's proposal. Mr. Shaw and Mr. Heather formulated a response to be presented to the complainant that evening. Mr. Shaw testified that he had some concern about picket line misconduct and wanted to take disciplinary action. He had reservations about agreeing to a "no reprisals" provision. Mr. Heather pointed out to Mr. Shaw that raising reprisals as an issue would not be conducive to a settlement. Mr. Shaw agreed with Mr. Heather not to press the matter further.

39. The respondent's counter-proposal made that evening orally, and then reduced to writing, maintained the same benefit and wage levels that had been offered in July 1984, with certain modifications, maintained the respondent's position with respect to contract language, agreed to no reprisals, and had the striking employees placed on lay-off, to be recalled as vacancies occur. There was some discussion between the parties about the respondent's proposals, which resulted in changing the respondent's recall proposal from recall based on job classification seniority to a recall based on seniority. During that discussion, Mr. Seguin asked Mr. Heather if the respondent's proposal might mean that some striking employees might never return to work. Mr. Heather replied affirmatively.

40. The respondent's proposal with respect to the recall of striking employees that was left with the complainant the evening of December 11th stated:

"8. Recall to work shall be by seniority as vacancies occur.

- Company will advise UIC re termination of strike (i.e. employees not recalled for above shall be considered as on 'lay-off' with full right of recall.
- thereafter employees will be recalled as required in accordance with the collective agreement.
- employees shall not loose [sic] seniority (i.e. have it reduced) by the term of the strike."

41. The complainant, after receiving the respondent's proposal orally and then in writing, wanted the evening to consider it. The complainant wanted to meet with the respondent the next

morning. While Mr. Shaw was not available to meet, and Mr. Heather had another meeting to attend later that morning, Mr. Heather did agree to meet with the complainant to receive its proposal.

42. During the evening the complainant prepared a counter-proposal by which it agreed to all of the items in the respondent's proposal except the one relating to the recall of the striking employees. Its written proposal relating to recall stated:

"The one remaining item on the above referred to employer proposal - item listed as no. 8 *is not* agreed to, except as indicated below.

In lieu of the Company proposal no. 8, the union proposes the following as a settlement:

- 1) Within two (2) days of union bargaining unit ratification of this agreement the company shall return to employment all bargaining unit employees who were employees on April 21, 1983; and
- 2) Upon the return to employment referred to in (1) above any reduction in employee requirements shall be instituted in accordance with the provisions of the collective agreement; and
- 3) The parties agree that employees hired on or after April 22, 1983 will not be retained in employment until and/or unless all bargaining unit employees referred to in (1) above are actively employed; and
- 4) The union agrees with the last item on the company proposal of December 11/84 referred to above which reads 'Employees shall not lose seniority (i.e. have it reduced) by the term of the strike.'"

That proposal was given to Mr. Heather the morning of December 12, 1984. During the discussions with Mr. Heather, Mr. Seguin explained that he wanted all employees, both striking and strike replacement employees returned to work "on paper", with the respondent reducing the work force in accordance with the terms of the collective agreement. We observe here that Mr. Seguin's explanation differs from the complainant's written proposal. However, we are satisfied that the respondent, through Mr. Heather, was advised of the complainant's position with respect to the recall of striking employees. Mr. Seguin testified that Mr. Heather, during the discussions that morning, made certain comments about the respondent and its unwillingness to agree to the proposal. Mr. Heather denied making the comments attributed to him by Mr. Seguin. We do not need to determine whether Mr. Seguin's recollection, assisted by contemporaneous notes he made of the meeting or Mr. Heather's recollection on this point is to be preferred. It is clear, regardless of which version of the meeting we accept, that the respondent was not prepared to accept the complainant's counter-proposal as explained by Mr. Seguin with respect to the recall of the striking employees.

43. Before Mr. Shaw left Mr. Heather the previous evening, the respondent's position on the recall of striking employees was made very clear to Mr. Heather. The respondent wanted to retain in active employment the employees who had worked for it during the strike. That was confirmed with Mr. Shaw's parents, the principals of the respondent, on the evening of December 11th and was subsequently reconfirmed on December 13th. Furthermore, Mr. Shaw did not instruct Mr. Heather to engage in negotiations on the morning of December 12th, but to simply receive the complainant's proposal.

44. Mr. Heather indicated to Mr. Seguin that he would pass along the complainant's proposal to the respondent's principals. Mr. Seguin advised Mr. Heather that since he was going to be driving home to Sudbury that evening, he could drop off a copy of the union's proposal at the res-

pondent's offices in Parry Sound. Mr. Seguin did that. The complainant heard no response from the respondent until it was advised by Mr. Heather, by telephone and by letter in early January 1985, that the complainant's counter-proposal was unacceptable.

45. Mr. Heather's letter stated:

"Your counterproposal respecting the return to work provisions as discussed at our December 11/12th meeting at the Ministry of Labour is unacceptable.

Further, be advised that the monetary proposal of the Company as outlined at the same meeting is withdrawn."

46. The only issue that prevented a settlement of a very lengthy strike was a return to work protocol. Yet, the complainant did not ask the respondent during the bargaining for the justification for its position only to recall the employees who had engaged in the strike in order of seniority as vacancies arose, nor did the respondent provide the complainant during bargaining with the justification for that position. Although Mr. Heather testified that he explained that the complainant's proposal was not acceptable on the grounds that it was not economically viable, the basis for that assertion was not explored. Indeed, Mr. Heather testified that he was unfamiliar with the company's production and Mr. Shaw, who advised Mr. Heather that the union's position was not economically viable testified in cross-examination that he was not involved in production either. Thus, it is unlikely that either of the respondent's representatives at the bargaining table would have been in a position immediately to review the economic viability of the return to work proposal.

47. During the course of the hearing in this matter, evidence was presented by the respondent suggesting that a sudden change in employees would be disruptive and that the employees hired as strike replacements were quite productive. While the respondent indicated that its procedures and processes had changed, we are not persuaded that the respondent put its mind to assessing the productivity of the striking employees in relation to the employees hired as strike replacements. Also, the respondent suggested at the hearing of this matter that the union's "paper recall" idea would lead to numerous grievances and arbitrations over the interpretation and application of the lay-off and recall provisions of the collective agreement.

48. Counsel for the complainant put the suggestion of a gradual recall to the witnesses for the respondent as a way of alleviating the respondent's concern about a sudden change of employees. While that might have made the complainant's proposals less unattractive to the respondent, that suggestion was also not made to the respondent during bargaining. Had the complainant asked for justification of the respondent's position, the sensible suggestions made to alleviate the concerns that the witnesses for the respondent expressed about the complainant's return to work proposals might have been explored. They were not however, and the opportunity for such an exchange was eliminated by Mr. Shaw's absence on December 12th, and his position with respect to the return to work proposal expressed to Mr. Heather on the 11th and confirmed internally by the respondent on the 13th.

49. Mr. Heather explained the withdrawal of the respondent's monetary offer. He had the authority to withdraw the offer that had been tabled and did so expressly out of concern that at some future point, when conditions might be different, the complainant would purport to accept the offer and claim that there was now a collective agreement. He was aware of the complaint pending before the Board involving Radio Shack where that was the issue.

50. When the parties met on December 11th, the respondent understood that the meeting would occur only on that day. The letter from the complainant indicating that it was prepared to

bargain non-stop was received by the respondent on December 10th. The respondent did not advise the complainant that it would not be present to continue negotiations the next day until the end of the day on December 11th, when Mr. Heather agreed that he would meet the complainant to receive its proposal on the morning of December 12th. Mr. Shaw was not able to be present on December 12th because he had arranged to pick up an item in Kitchener that morning. Mr. Shaw agreed in cross-examination that other employees of the respondent were often used to do the kind of errand that Mr. Shaw was doing that morning. When asked by counsel for the complainant what effort was made to have someone else do that errand in place of him, Mr. Shaw said he had made none since there was no need to make any alternative arrangements.

51. Mr. Heather also testified in cross-examination that the respondent's position with respect to the recall of the striking employees was explained to the complainant. He said that he was under instructions from the respondent that the respondent wanted to retain the employees who had worked during the strike. Mr. Heather testified that Mr. Shaw gave him those instructions on December 11th. With those instructions made clear to Mr. Heather, it is apparent why Mr. Shaw saw no need to make other arrangements for picking up the item in Kitchener in order to be available for the continuation of the meeting on December 12th.

52. The central focus of the bargaining between the parties at the end of the day on December 11th and on the morning of December 12th was how the striking employees could be returned to work. The complainant had agreed to all of the company's proposals except for a return to work protocol. Counsel for the complainant submitted that the respondent violated sections 15, 64 and 66 of the Act by maintaining its position with respect to the recall of employees. Furthermore, he also submitted that the respondent's subsequent withdrawal of the monetary offer on December 31st also violated section 15.

VIII

53. Section 15 of the *Labour Relations Act* requires the parties to collective bargaining to bargain in good faith and make every reasonable effort to reach a collective agreement. The Board is principally concerned with the process of collective bargaining, not the content, except where the content of bargaining patently demonstrates a desire to avoid a collective agreement. (See *Radio Shack*, [1979] OLRB Rep. Dec. 1220; *The Daily Times*, [1978] OLRB Rep. July 604; *T. Eaton Co. Ltd.*, [1985] OLRB Rep. March 491.) This view was expressed recently in *Radio Shack*, [1985] OLRB Rep. Dec. 1789 at 1798:

"The fact that the company's proposals may not have been acceptable to the union, does not mean that the company was not prepared to enter into a collective agreement - albeit on its own terms; nor is it really very helpful to suggest that the proposals were 'predictably unacceptable'. That characterization is equally applicable to the union's proposals, and if that were the test for a breach of section 15 of the Act, then the legality of a party's bargaining stance would turn on the willingness of the other side to accept it. It may be that a union's failure to achieve its stated goals will diminish its stature in the eyes of its members and make it less attractive to prospective members. But this does not mean that employer resistance is illegal. The union may simply have over-estimated its ability to wring concessions from an unwilling employer and misjudged the effectiveness of its strike weapon.

This is not to say that the Board is totally unconcerned with the *content* of the parties proposals or that there are no limits whatsoever on the scope of bargaining. In some circumstances, the Board may well have to assess the content of the items tabled in order to determine whether an employer does not really intend to enter into any collective agreement or whether it is really refusing to recognize the union as the exclusive bargaining agent (see *Radio Shack*, [1979] OLRB Rep. Dec. 1220; *Fotomat Canada Limited*, [1980] OLRB Rep. Oct. 1397; *Irwin Toy Limited*, [1983] OLRB Rep. July 1064 and, particularly, *Wilson Automotive (Belleville) Limited*, [1980] OLRB Rep. July 1136.) Bargaining proposals may provide evidence of such unlawful

motive, and the Board may also review the content of those proposals to assess whether any of the proposed items is 'illegal'. ... However, in general, the Board's role under section 15 of the Act is one of monitoring the process of bargaining, and not the content of the proposals advanced."

54. In examining the conduct of the parties, the Board does not set its own standard of what a fair or just settlement will be and then measure a party's conduct against that standard. Such an approach is inappropriate simply because collective bargaining involves the exercise of power by a party acting out of self-interest. See *Canada Trustco Mortgage Company* [1984] OLRB Rep. Oct. 1356 at 1364; *Fotomat Canada Limited*, [1980] OLRB Rep. Oct. 1397 at 1421; *Goldcraft Printers Ltd.*, [1980] OLRB Rep. Apr. 448 at 445-57; *Cross Tube Products*, [1980] OLRB Rep. May 669. In *Pine Ridge District Health Unit*, [1977] OLRB Rep. Feb. 65 the Board said in that vein:

"It should be stressed, however, that section 14 [now 15] of the *Labour Relations Act* is not intended to redress any imbalance of bargaining power that may exist between the parties. A party whose bargaining strength allows it to force the acceptance of hard terms at the bargaining table does not thereby bargain in bad faith. The very word 'bargain' presupposes that the parties will seek to maximize their own best interests. Hard bargaining, albeit ruthless, is not bad faith bargaining."

55. The Board must also be mindful of a party's temptation to use the Board and its processes as a substitute for bargaining power in trying to achieve its collective bargaining goals. The Board in *Fotomat Canada Limited*, *supra* at 1421 stated that its role is not to redress an imbalance of bargaining power, but to ensure that the process of collective bargaining is carried out in accordance with the Act:

"Where a trade union impugns an employer's position on one particular position or on its tough overall posture at the bargaining table and this alone, the Board has to be careful to avoid being used by that trade union to supplement its bargaining power as we must be cautious to ensure that the hard bargaining does not have as its purpose, the destruction of the trade union. While it may be that a bargaining agent has its 'heart set' on a particular provision as a matter of principle, it must still have the bargaining power to achieve this end. Moreover, tactical errors can have a dramatic affect on a party's bargaining power or lack thereof and, in the words of a relevant fairy tale, this Board cannot be expected 'to put all of the pieces back together again.' See *Ottawa Journal*, [1977] OLRB Rep. June 309 at para. 59. Complainants must realize that section 14 [now 15] allegations will be considered in the light of the conduct of both parties and the remedies requested must bear a direct relationship to the breach established as a matter of causation. The Board must be particularly sensitive to the reality of collective bargaining in prolonged strike bound negotiations where inter-personal conflict can become quite embittered and where the temptation to turn to the labour board to supplement a party's bargaining power may be great. See, *Ottawa Journal*, *supra*. It has long been recognized that the content of the bargaining duty may change as a bargaining impasse continues. Strikes can be lost as well as one. See *New Method Laundry and Dry Cleaners*, (1957) 57 CLLC 18,059."

56. Unless we find that the respondent's position with respect to the return to work of the striking employees contravened the Act, discussed *infra*, the complainant has failed to establish a violation of section 15 of the Act. The *Labour Relations Act* does not grant to employees who engage in a legal strike the absolute right to return to work at the conclusion of a strike. Therefore, merely because the respondent sought to have striking employees return as vacancies arose does not, in and of itself, establish a violation of section 15.

57. In *Mini Skools Ltd.*, [1983] OLRB Rep. Sept. 1514; application for judicial review dismissed, June 24, 1985, unreported; application for leave to appeal dismissed, December 3, 1985, unreported, the Board reviewed in detail the situation of striking employees under the law of Ontario at 11-14:

"11. While not directly on point, an early but leading American case merits review at the very outset of our analysis. In *National Labor Relations Board v. Mackay Radio Company & Telegraph Company*, 2 LRRM 610 (USSC 1938), the National Labor Relations Board and the United States Supreme Court were confronted with a number of questions centering on the status of striking employees and their right to return to work following the cessation of a strike during which the employer had continued to operate through the employment of strike replacements. The Court noted that section 2(3) of the *National Labour Relations Act* specifically provided that an employee included 'any individual whose work has ceased as a consequence of, or in connection with, any current labour dispute or because of any unfair labour practice, and who has not obtained any other regular and substantially equivalent employment, ... (at page 614).' Thus strikers, the Court held, remained employees for the purposes of the Act and were protected against the unfair labour practices denounced by it. The Court, however, also noted it did not follow that an employer, guilty of no act denounced by the statute, had lost the right to protect and continue his business by supplying places left vacant by strikers. The Court further noted that he was not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. In that case the Court held that an assurance by the respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labour practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled. In fact, however, the respondent employer's conduct was censured by the Board and the Court because it was found that the respondent refused to reinstate certain striking employees for the reason that they had been active in the union. Nevertheless, the general principles articulated by the Court have been followed by the NLRB and the American courts from that time forward. Indeed, at least one justice of the Supreme Court of Canada, Mr. Justice Locke, in *Canadian Pacific Railway Co. v. Zambri* (1962), 62 CLLC ¶15,407 at p. 451, indicated his views that the collective bargaining scheme envisaged by *Mackay Radio* was the law in Canada as well. In this respect he wrote:

'While unnecessary for the disposition of this appeal, I wish to express my dissent from the opinion that has been stated that if a strike is never concluded by settlement the relationship declared by ss. (2) of s. 1 continues until the employee has either gone back to work, taken employment with other employers, died or become unemployable. When employers have endeavoured to come to an agreement with their employees and followed the procedure specified by the *Labour Relations Act*, they are at complete liberty if a strike then takes place to engage others to fill the places of the strikers. At the termination of the strike, employers are not obliged to continue to employ their former employees if they have no work for them to do, due to their positions being filled. I can find no support anywhere for the view that the effect of the subsection is to continue the relationship of employer and employee indefinitely, unless it is terminated in one of the matters suggested.

Subsection (2) of s. 1 appeared first in Ontario legislation in c. 33 of the Statutes in 1950. Legislation of this nature appeared at an earlier date in the *Strikes and Lock-outs Prevention Act of Manitoba*, being c. 40 of the Statutes of 1937, and in the *Wartime Labour Regulations* prescribed by the Governor General in Council on February 17, 1944, which were adopted in Manitoba by c. 48 of the Statutes of 1944. Similar legislation was enacted thereafter in the *Industrial and Conciliation Arbitration Act of British Columbia* and the *Alberta Labour Act*.

The idea of creating this artificial relationship appears to have originated in the *National Labour Relations Act of the United States*, commonly referred to as the *Wagner Act*, passed on Congress on July 5, 1935, section 2 of which declared that the term 'employee' shall include any individual whose work had ceased as a result of a current labour dispute and who has not obtained any other regular and substantially equivalent employment.

I do not construe the decision in *Jeffrey-DeWitt Insulator Company v. National Labour Relations Board*, (1937) 91 Fed. (2nd) 134, and *National Labour Relations Board v. Mackay Radio and Telegraph Company*, (1938) 304 U.S. 333, as deciding that in the United States the relationship continues indefinitely unless that relationship has been abandoned, as has been said.

In the first of these cases, the employer had refused to bargain with the union, which represented its employees on the ground that by striking they had ceased to be such and Parker, J., held that this was an unfair labour practice since the strike did not in itself terminate the relationship either at common law or under the *Wagner Act*.

In the second case decided in the Supreme Court, the employer, following the settlement of the strike, had refused to employ five men on account of union activities during the strike, and the finding that this was an unfair labour practice was upheld, reversing the judgment of the Circuit Court of Appeals. Roberts, J., who delivered the judgment of the court, said, *inter alia*, that it did not follow that an employer guilty of no act forbidden by the statute had lost the right to protect and continue his business by supplying places left vacant by the strikers and was not bound to discharge those he had thus hired upon the election of the strikers to resume their employment in order to create places for them. That is the law in Canada also, in my opinion.

I would dismiss this appeal with costs.'

While we are not bound by either 'the *Mackay* doctrine' or Mr. Justice Locke's obiter in *Canadian Pacific Railway Co. v. Zambri*, they are significant views of the nature of the employment relationship in the context of the economic contest between employers and employees created by collective bargaining. From this perspective, an employer's right to continue his business is not encroached upon by collective bargaining laws and a normal incident of continuing to operate is the act of hiring. On the other hand, these same labour laws have made clear that this act of hiring does not terminate the employment relationship of striking employees although without clear statutory language to the contrary, there is no legal entitlement to one's former position if it has been filled. This is the way the *Mackay* Court saw the system operating.

12. On the other hand, and as Professor Paul Weiler has observed, this line drawn between unlawful discharge and lawful permanent replacement is seen by many as a legal distinction without a factual difference. See Weiler, *Reconcilable Differences* (1980) at page 76. Why should employees, it can be asked, need to risk loss of their jobs to engage in the collective bargaining process? Moreover, the threat of permanent replacement can incite ugly violence as long service and older workers witness replacements going to work each day across the picket lines to perform 'their work'. It was these concerns that eventually lead to passage in Ontario of section 73 of the *Labour Relations Act*. This section guards against the permanent loss of an individual's job where he has struck and his employer has continued to operate through the employment of strike replacements. Employees engaging in collective bargaining are assured that the decision to participate in a strike need not inevitably put one's job at risk. But while the *Mackay* doctrine was seen as too discouraging of collective bargaining, the balancing considerations for this greater job security for striking employees in Ontario provided that the statutory resumption of employment would be on such terms as the employer and employee might agree and the right would apply for only six months from the commencement of the strike. In fashioning a policy initiative in this area, the Legislature recognized it was potentially affecting bargaining power and attempted to balance or minimize the impact of its intervention on the collective bargaining process and on the then existing strengths of labour and management.

13. In *The Becker Milk Company Limited and Ind-Ex Distributors Limited*, [1977] OLRB Rep. Dec. 797, [1978] 1 Can. LRBR 175, this Board reviewed the impact of section 73 against the principles that existed prior to its enactment in the following terms (at pages 179-180 of the Can. LRBR report):

'Ordinarily when a strike is successful the striking employees return securely to their jobs as a result of the negotiated settlement. But not all strikes are won. When a strike had ended and has ended in failure, what are the legal rights of the unsuccessful strikers with respect to their jobs, particularly when those jobs have been filled by replacements hired during the strike?

It is an accepted principle of industrial relations law in Ontario that a struck employer has the right to protect and continue his business. He may try to do that in a number of ways. He may seek to contract-out the work of the struck bargaining unit. He may

rearrange the work of non-striking employees, insofar as their employment contract allows. He may press management staff into work on the shop floor on a fill-in basis. Or he may hire replacements. Thus when a strike has ended in failure and his union has been unable to negotiate a return-to-work clause, the unsuccessful striker may find that his job is held by a replacement. Does that fact change his status as an employee under The Labour Relations Act?

It was apparently once thought in both Canada and the U.S. that while a strike itself would not terminate an employee's status (because of the protection of section 1(2) of the *Labour Relations Act* and the similar provision in section 2(3) of the *National Labour Relations Act*) the separate act of hiring a replacement by the employer during the strike did have the effect of ending the employment status of the striker who was replaced. (See *Royal Commission Inquiry Into Labour Disputes*, the Hon. L.C. Rand, Aug., 1968 at p. 24; *Bartlett-Collins Co.* 110 N.L.R.B. 395 (1954); *Atlas Storage Division v. N.L.R.B.* 112 N.L.R.B. 1175 (1955), enforced sub. nom. *Chauffeurs Teamsters & Helpers Local No. 200 v. N.L.R.B.* 233 F. 2d 233 (7th Cir. 1956); *Brown and Root Inc.*, 132 N.L.R.B. 486 (1961), enforced, 311 F. 2d 447 (8th Cir. 1963).

That limited interpretation of section 1(2) was criticized by the Rand Royal Commission as being an unjustified disregard of the rights and benefits of employees accumulated over years of service. According to the Commission that view ignored the fundamental purpose of the section by placing the economic life of the employee at the arbitrary will of the employer. To maintain that the act of hiring replacements would extinguish all of the vested rights and the very employment status of strikers would, in the words of the Report, 'reduce the validity of a strike to mockery'.

Whatever uncertainty there may have been in this province with regard to that issue was resolved one year after the tabling of the Rand Report. In its decision in *McLeod*, *supra* at p. 1104) the Board expressly rejected the contention that the hiring of a replacement terminated the employment status of a striking employee that is protected by section 1(2). Similarly, in the United States the National Labour Relations Board and the courts have corrected the course of earlier decisions and have interpreted section 2(3) of the *National Labour Relations Act* as preserving the status of strikers as employees notwithstanding the hiring of replacements by the employer during the strike. (*N.L.R.B. v. Fleetwood Trailer Co.* 389 U.S. 375 (1967), enforcing 153 N.L.R.B. 425 (1965); *Laidlaw Corp. v. N.L.R.B.* 414 F. 2d (7th Cir. 1969) and see generally Martin, 'The Rights of Economic Strikers to Reinstatement: A Search for Certainty' (1970) Wisc. L. Rev.

But what is the extent of an employee's right under section 1(2)? More particularly, does the employee who returns to work after a strike have a right to 'bump' a replacement and assume his old job? In Ontario that will depend on whether he returns under the protection of section 64 [now 73] of the Act.

Under *The Labour Relations Act* strikers continue to be employees and they are not to be discriminated against for having exercised their right to strike.

[emphasis added]

When a strike that lasts beyond six months ends in failure there may be existing job vacancies that subsequently arise by the departure of replacements or the creation of new jobs. The qualifications of the former strikers to fill those jobs may in many cases be inferred from their original hiring and past employment. An employer who refused to give those jobs to returning employees qualified to fill them commits an unfair labour practice to the extent that the refusal amounts to a calculated penalizing of a group of employees for having exercised their lawful right to strike. (cf. *Fleetwood Trailer Co.*; *Laidlaw Corp.* (*supra*)). The refusal of an employer to put employees back to work in those circumstances is no less a breach of the Act than any attempt to discharge them outright for engaging in the right to strike (cf. *Webster v. Horsfall* 69 CLLC ¶16,050). But, subject to whatever better rights their union can obtain for them, that appears to be the limit of the protection that strikers in that circumstance

can expect. *An integral feature of the balance of power in collective bargaining is that strikers who return to work without the protection of section 64 [now 73] of the Act cannot, as a legal right, displace replacements who were hired in their stead.'*

[emphasis added]

14. This statement of principle was applied in *Fotomat Canada Limited and United Steelworkers of America* [1980] OLRB Rep. Oct. 1397, [1981] 1 Can. LRB 381 at pages 409-410, although an exception was developed in that case to deal with the situation where a strike had been taken beyond the six month period by the commission of independent unfair labour practices by the employer. In this report the Board stated:

'... As a strike endures, the commitment of an employer to the employees who have helped it resist the strike may become great and, in the usual case, it is for the negotiation process to reconcile this commitment with the interest of striking employees to return immediately to their jobs. Where the trade union is unable to negotiate their immediate return because of the employer's commitment to replacement employees, striking employees who make an unconditional application to return have to be treated, essentially, as employees on layoff and must be considered in filling subsequent vacancies. The rationale of this conclusion is found in the *Becker Milk* case quoted above and in *Fleetwood Trailer Co.* (1967), 66 LRRM 2737. Thus, while the letter of June 27, 1980 may convey the respondent's intention not to recall striking employees immediately to the detriment of strike replacement employees, this is not in itself improper. There is no indication in the letter that striking employees would, on their unconditional application, be refused access to subsequent vacancies.

We are therefore left with the complainant's second argument -- that to fail to reinstate the striking employees would simply reward the respondent having brought the complainant 'to its knees' by unlawful means. This raises the appropriateness of such a remedy in the circumstances and the related question of whether it is necessary to effectuate the policies of the Act.

In many cases coming before the National Labour Relations Board, such as *Laidlaw Corp.* (1968), 68 LRRM 1252, affirmed (1969), 71 LRRM 3054 (CA-7), cert. denied (1970), 73 LRRM 2537 (U.S.C.C.), it has been plain that the employer's unfair labour practices caused the employees to initiate or prolong a strike and in such cases the Board has quite uniformly ordered the employer to reinstate the striking employees to their former positions, discharging if necessary replacements hired during the strike. That Board has, therefore, treated the unfair labour practice striker somewhat more favourably than the economic striker in the sense that the latter employee has no immediate right to reinstatement without a settlement to this effect. See *NLRB v. MacKay Radio and Telegraph Co.*, (1938), 304 U.S. 333, 58 S.Ct. 904. This distinction can become very significant where a strike is initiated over bargaining demands but, during the course of the strike, the employer commits unfair labour practices. The employer's unfair labour practices will be held to 'convert' the strike if it can be determined that the employer's actions prolonged the strike beyond the date it would have been terminated as only an economic strike. For example, in the *Laidlaw Corp.* case, *supra*, the Board applied the 'conversion' doctrine and found that what had begun as an economic strike was converted into an unfair labour practice strike when it was prolonged by the union's vote to protest the employer's outright termination of strikers seeking reinstatement. The Board applied its usual rule that the strikers who were permanently replaced during the economic phase of the strike were not entitled to immediate reinstatement, while the strikers replaced after the date of conversion were.

We do not think that the OLRB needs to adopt all the American trappings of an unfair labour practice strike, but the concept's underlying purpose has considerable relevance to the exercise of this Board's jurisdiction under section 79 [now 89]. Where, for example, employees go on strike and it is subsequently determined that the employer has committed certain basic and flagrant unfair labour practices, their security of employment may become a remedial issue. This may, particularly, be the

case where the period under section 64 [now 73] has lapsed and the only opportunity for immediate reinstatement without a remedial order from the Board is through a negotiated settlement to that effect. If the trade union's capacity to negotiate that result has been put into question or eroded by the employer's unlawful resistance, the failure of the Board to provide for the return to work of striking employees would have the result of rewarding the employer for his unlawful actions. On the other hand, as a strike endures strike replacement employees who have been permanently hired develop an interest in their job which this Board cannot ignore. Their interests should be considered in light of the time and gravity of the employer's unfair labour practice together with any expectations they might have as a result of employer commitments."

58. Therefore, in the absence of any illegal motive, we believe that the respondent's position at the bargaining table with respect to the return of striking employees, while harsh, was not contrary to section 15.

59. Similarly, the respondent's withdrawal of its monetary offer was not, in our opinion, designed to frustrate bargaining. We are satisfied that the respondent wanted to be in a position to bargain with the complainant if or when the complainant wanted to return to the bargaining table. Mr. Heather's explanation for the withdrawal of the offer on December 31st was credible and is also consistent with the principles discussed by the Board *Toronto Jewellery Manufacturing Association*, [1979] OLRB Rep. July 719; *Fotomat Canada Limited*, *supra*; *Pine Ridge Health Unit*, *supra* and *Radio Shack*, [1985] OLRB Rep. June 901.

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60. The complainant also contends that the respondent's position with respect to the return of striking employees violated section 64 and 66 of the Act. As indicated at the outset of this decision, the burden of proof lies on the respondent to persuade us that its position with respect to the return to work of employees who engaged in the strike did not contravene section 64 or 66 in relation to the striking employees' "employment, opportunity for employment or conditions of employment."

61. The evidence relevant to this issue was not in dispute in any material way. The respondent hired employees after the strike began on a temporary basis. David MacCallum, an employee who was hired after the strike began, testified that he was advised when he was hired that he had a job as long as the strike continued. Indeed, it was the temporary nature of that job that caused Mr. MacCallum to leave his employment with the respondent when other permanent work became available. He returned to work for the respondent when his new employer began to have financial difficulties. Notwithstanding the understanding that the respondent had with the employees hired as strike replacements, Mr. Shaw and Mr. Heather's evidence is quite clear that the respondent wished to retain the employees who had worked for it during the strike. Indeed, Mr. Shaw suggested the respondent had a moral obligation to those employees.

62. While the complainant did not specifically put a return to work proposal to the respondent in bargaining on December 11, 1984, the respondent's return to work offer was discussed. We are satisfied that the complainant's concerns about its members not being able to return to work were made clear to the respondent. The respondent did not alleviate those concerns. Mr. Heather indicated that the possibility that the striking employees may not ever return to work did exist, but also that he could not say with certainty what the respondent's future plans might be. However, underlying those discussions was the firm position of the respondent that employees hired during the strike were to remain at work.

63. The complainant's written proposal of December 12th presented to Mr. Heather was

not, on its face, the same as Mr. Seguin's explanation of having all employees treated equally for purposes of recall. Nevertheless, Mr. Seguin's oral proposal was explained to Mr. Heather on December 12, 1984. That proposal was more than the respondent was prepared to agree to, as both Mr. Shaw and Mr. Heather testified. The respondent, through Mr. Heather, knew or ought to have known that the complainant, by the end of the meeting on December 12, 1984 was seeking to have both the striking employees and the employees hired after the strike began treated as one combined group for purposes of being assigned to available work. The respondent, however, was not prepared to accept that scheme as a return to work protocol, on the basis that it would adversely affect production and also, we divine from Mr. Shaw's evidence, because of Mr. Shaw's self-imposed moral obligation not to replace the employees who worked during the strike.

64. We are *not* persuaded that the employer's refusal to agree to a return to work protocol that might cause the displacement of some or all of the strike replacement employees was not contrary to sections 66 and 64 of the Act. Both the employees hired as strike replacements and employees who engaged in the strike were employees of the respondent in the bargaining unit. See section 1(2) of the Act. In our opinion, the preference that the respondent exhibited towards maintaining the active employment of persons it had hired after the strike commenced and who worked during the strike, taken together with the respondent's adoption of a moral obligation to those employees can be reasonably viewed as discriminating against the striking employees by reason of their exercise of rights under the *Labour Relations Act* to engage in a legal strike. That is, employees who engage in a legal strike are exercising a right under the Act. See *Humber College*, [1979] OLRB Rep. June 520 at 530. Put another way, the express preference to retain employees who were hired after the strike commenced distinguished between the two groups of employees on the basis that one group participated in a legal strike while the other group did not.

65. Section 66 of the *Labour Relations Act* states in part:

66.No employer....,

- (a) shall ... discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under Act;

It seems to us that the difference between the respondent's treatment of the striking employees and the employees hired as strike replacements in regard to being actively at work is a difference based in large part upon the striking employees' exercise of rights under the *Labour Relations Act*. That basis for distinction between the two groups of employees of the respondent violates section 66 since the respondent is discriminating against the striking employees by reason of the fact they were participating in a lawful strike against it.

66. The Board, in *Mini Skool*, *supra*, in finding that the employer did not violate the Act by insisting that striking employees be recalled as vacancies occur, was not dealing with employees hired after the strike commenced but rather was dealing with employees who had engaged in the strike, but had returned to work. Of particular significance in that case was the claim that the striking employees could replace more junior employees who had exercised their statutory right under section 73 of the Act to return to work. The Board there wrote:

"We have reviewed the labour relations debate surrounding the status of striking employees in relation to strike replacements in order to put the complainant's claims in perspective. Section 73 can be seen as an implicit statutory recognition of the *Mackay* approach in that the provision would have a very limited role if, as a matter of the general unfair labour practices sections, every striking employee had a statutory right to the return of his job at the conclusion of the strike. But what is important to understand is that the complainant is asserting the much more tenuous claim that striking employees have a statutory right to replace fellow employees with

whom they were employed at the commencement of the strike and who exercised their statutory right to return to work pursuant to section 73. In fact, even if the complainant were asserting this claim within the six month period and on the basis of section 73, it is far from clear that senior striking employees could rely on the section to replace more junior employees working in a common classification they had all worked in prior to the strike's commencement particularly where the junior employees had returned to work first pursuant to the section. There was a temporary shortage of work due to the strike and the respondent allocated part of the available work to persons in his active employ. There is the expectation that as the enrollment returns to capacity all striking employees will be recalled. The interest of the grievors is therefore much less compelling than that of striking employees who have been permanently replaced by fresh hires...."

We do note that the Board in that case went on to make the following statement:

"And yet the existence of section 73 is some evidence that this (permanent replacement) is the potential economic reality otherwise facing striking employees. Because of expiration of the six month period, the grievors could not replace or bump strike replacement employees hired after the strike commenced. Therefore, why should they have any greater statutory entitlement against employees with whom they worked prior to the commencement of the strike and who, returned to work pursuant to the statute?"

While it would appear that the Board there made a blanket statement that striking employees could not replace employees hired after the strike once the six month period set out in section 73 of the Act expired, it seems to us that that statement relates to a situation in which there was not an improper motive for the refusal to displace those employees hired after the commencement of the strike. Furthermore, the Board was satisfied in that case that the respondent did not have any discriminatory motive for its position. See the concurring opinion of Board Member W. F. Rutherford in *Mini Skool, supra* at page 1530, where he wrote: "... our Board would not permit employer discrimination against employees by reason of their participation in a strike,...". The respondent in this case has failed to satisfy us that it has not done so.

67. We are not persuaded the respondent's position was based entirely on concerns about productivity. Neither Mr. Shaw nor Mr. Heather could testify about the production requirements of the respondent and what kind of skills might be needed by employees to perform the available work. Furthermore, the respondent's offer to recall employees by seniority as vacancies arise did not take into account that a senior employee might not have the skills necessary to perform the vacant job. The respondent's concession to the complainant in bargaining on that point merely illustrates, in our opinion, that the respondent was not as concerned with maintaining productivity as with ensuring that employees hired after the strike commenced remained actively at work. More importantly, the respondent's self-imposed moral obligation to employees who were hired on the understanding that their employment would end when the strike was settled underlines the distinction the respondent was making between the two categories of employees based upon their exercise of the right to strike under the Act.

68. The respondent has failed to persuade us that it did not act contrary to section 66 with respect to the terms and conditions of employment of the striking employees. Thus, we find that the respondent discriminated against the striking employees with respect to their terms and conditions of employment by reason of their exercise of rights under the *Labour Relations Act*, on and after December 13, 1984, the date that officials of the respondent met to confirm Mr. Shaw's position with respect to the recall of the striking employees. Furthermore, that discriminatory conduct, in our view, also violated section 64 of the Act by impairing the complainant's ability to represent employees.

69. Additionally, since we have determined that the respondent's position with respect to

the recall of striking employees was contrary to section 66, that finding also establishes the respondent's improper motive for its bargaining position with respect to the recall of the striking employees. Thus, we find that the respondent's position on that issue violates section 15 of the Act. Indeed, it is the antithesis of good faith to maintain a position in bargaining on the only issue that prevents the settlement of a strike that is contrary to section 66 of the Act.

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70. Counsel for the intervening employees made submissions with respect to the appropriate remedy, if we found that a violation of the Act had been made out. There was no challenge to counsel's standing to participate in these proceedings. Counsel submitted that the Board should also consider the interests and expectations of the employees hired as strike replacements in fashioning an appropriate remedial order.

71. The employees hired as strike replacements were hired temporarily, and it is clear from the evidence that their length of employment was a function of the length of the strike. As our remedial order below does not direct either the complainant or respondent to act in any particular way with respect to the employees hired as strike replacements, and any impact of our order on the employees hired as strike replacements is contingent upon the strike ending, those employees' job interests are not directly affected, and we need not consider them further since their temporary employment was only to continue until the conclusion of the strike.

XI

72. The parties are under a continuing obligation to bargain in good faith and make every reasonable effort to reach a collective agreement. Therefore, aside from the statutory obligation that exists, as a remedy for the breach of section 15, we direct the parties to meet within 21 days of the release of this decision. We further direct the respondent to provide the complainant with a complete proposal for a collective agreement at that meeting, with that proposal containing a return to work protocol that does not discriminate between the employees hired after the commencement of the strike and the striking employees. Not less than 5 days prior to that meeting, the complainant is to provide the respondent with the names and addresses of the respondent's employees that were on strike as of December 13, 1984 and indicate to the respondent which of those employees wishes to return to work.

73. We direct the respondent to compensate each of the striking employees for the loss of wages and benefits from December 13, 1984 to the earlier of either: a) the date they ceased being an employee of the respondent on strike or (b) the date the parties agree to a return to work protocol.

74. Additionally, we direct the respondent to compensate the complainant for the losses, if any, caused by the respondent's violation of sections 15 and 64.

75. The amount of compensation awarded includes interest in accordance with the Board's normal practice and is subject, of course, to the usual principles of mitigation.

76. This panel of the Board shall remain seized with determining the amount of compensation to be paid to the employees and the complainant if the parties cannot agree, and with any other issues arising out of the implementation of our remedial order.

DECISION OF BOARD MEMBER J. KENNEDY;

1. The Board in this case was faced with difficult legal and labour relations issues because the company and the union were not able to reach a collective agreement during a strike that had gone on for almost three years, as of the last day of hearing. That strike would have ended in December, 1984 or perhaps even earlier, if the striking employees had the clear right under the *Labour Relations Act* of Ontario to return to their jobs when a strike is concluded. Legislation similar to section 11.1 of the Manitoba *Labour Relations Act*, which guarantees striking employees the right to return to their jobs at the conclusion of a strike, is necessary in this province if the kind of conflict that arose in this case is to be avoided in the future. Unfortunately, that is not yet the law of this province, and as the Vice-Chairman of this panel of the Board points out in paragraph 56 of his reasons, employees who are the victims of legitimate economic warfare do not have any recourse in getting back to work.

2. I agree with the review of the evidence and the findings of fact set out in the Vice-Chairman's reasons. In my opinion, the evidence we received was clear. The company's employees who went on strike were not the victims of the company's legitimate exercise of economic power. Rather, the company chose to keep the striking employees out of work while continuing to employ strike breakers simply because the striking employees engaged in a legal strike. Mr. Shaw, on behalf of the company, referred to a "moral obligation" to the strike breakers. It was readily apparent to me that the moral obligation that the company so self-righteously spoke of was nothing more than an attempt to dress up an excuse for refusing to return the striking employees, all of whom had been with the company for many more years than the strike breakers, to active work. Whether it is called a moral obligation or teaching the striking employees a lesson, it is the same. The company chose to distinguish between its employees because the striking employees exercised their right under the *Labour Relations Act* and for that reason the company was not prepared to have the employees who had engaged in the strike displace the employees who it hired as strike breakers.

3. The evidence presented to us at the hearing, in my opinion, only pointed in this direction. I do not see how there could even be any doubt as to what the company was trying to achieve. I do not think there was any need to resort to section 89(5) of the *Labour Relations Act*. Nevertheless, I wish to state that I agree with the Vice-Chairman's analysis of section 15 of the *Canadian Charter of Rights and Freedoms* when he concludes that the kind of distinction that section 89(5) makes between employers and individuals who are not employers does not even suggest the kind of discrimination that section 15 of the *Charter* was addressed to.

4. While I agree with the conclusions reached, I do not believe that the company in this case even had the right to raise the objection to section 89(5) of the *Labour Relations Act*. Section 15 of the *Charter* protects individuals and not corporations. The employer is a corporation. Since this is not a criminal proceeding, I simply fail to understand how the Supreme Court of Canada's decision in *Regina v. Big M Drug Mart Ltd.* can be used to give a corporation the right to challenge the legality of a statute that does not infringe any of the rights the corporation has or has been given by the *Charter*.

DECISION OF BOARD MEMBER R.J. GALLIVAN;

1. I disagree with the majority on a number of its conclusions some of which, I respectfully submit, appear to have been reached without full and objective regard for the facts.

2. I do, however, agree with the majority's conclusion that an employer is entitled to claim that Section 89(5) of the *Labour Relations Act* is unconstitutional. I disagree with the conclusion that a discriminating distinction between employers and all others covered by the Act is not an ille-

gal discrimination under the *Canadian Charter of Rights and Freedoms*. The view taken by the majority that employers as a class can be unjustly discriminated against with impunity under the *Charter* seems too narrow a perspective to accord with the Supreme Court's advice (quoted by the majority in paragraph 24 of its decision) of "the need for a broad perspective in approaching constitutional documents...".

3. Having chosen, apparently, to ignore that advice the majority then goes on to conclude that the evidence for and against the respondent in this case is so evenly balanced that resort must be had to the impugned Section 89(5) of the Act in order to support a finding against the employer. That section as interpreted by the majority in this case requires the employer to accept the burden of proving a negative - that it did *not* discriminate illegally against the strikers for exercising their right to strike. The reverse onus provision of the Act is triggered where the complainant has no evidence to offer in support of an allegation (other than that presumably an event occurred) or where the evidence in support of an allegation against an employer is to all intents and purposes equally balanced by the employer's defence. "Balance" means a state of equilibrium, or equality between each side. It thus implies evidence of equal weight on both sides of a proposition. Here, the only evidence to support the union's allegation is the company's back-to-work offer. There is no other evidence to support the charges. On the other side of the scale is the unequivocal and uncontraverted evidence of the employer that its back-to-work offer was motivated solely by its economic self interest - an employer offer regarded by both union and management practitioners in labour relations in this Province, by the courts, and by this Board up to now, as perfectly legal in the circumstances.

4. Among those circumstances in this case is a strike which started in April 1983 and which the union apparently had lost. The evidence is that the strike began when the company's business was still recovering from the 1982/83 economic recession in Canada. As a consequence of that business environment, some of the union's members in the respondent's bargaining unit were on layoff when the strike began. Nevertheless, the union struck as it had the legal right to do. Instead of shutting down its plant the company decided to continue to operate, as it had the legal right to do.

5. The act of striking, when stripped of all the rhetoric which usually accompanies discussion of the subject, comes down to a decision which each employee in the bargaining unit must make for him or herself. The decision essentially is this: am I prepared to continue working for my employer under the working conditions he is offering, or not. In considering his answer the employee must take account of a number of factors such as his own financial staying power and the peer pressure he will be under (sometimes, as here, expressed through picket line violence) if he decides against the majority view. He must also consider that if his answer is "no, I won't work under those conditions", someone else might be quite content to do so - either some of his fellow workers or others to whom the employer may offer his job. That, to the employee, is the essential risk of striking: *the permanent loss of employment with that employer*. In refusing to work the striker is gambling that the employer's working conditions are so unacceptable that no one else would tolerate them either. In refusing to improve those conditions the employer is gambling that his employees are wrong and that either they will change their minds later or that he will be able to attract others to work for him. If he judges wrongly, he risks losing his ability to supply his customers and ultimately his business. That, to the employer, is the risk: *the permanent loss of his business*. Those judgements by, and risks to both parties represent the leverage, the economic sanction which drives the free collective bargaining system. The viability of the employer's final offer is put to the test in the marketplace.

6. In this case, the employees apparently miscalculated. The employer was able to attract others to his employ and to continue his operations. So the strike dragged on. In such circum-

stances in Ontario, the Legislature has, through Section 73 of the Act, given employees the opportunity gracefully to extricate themselves where they have miscalculated or been misled into overestimating their economic leverage. In this case the employees chose not to take advantage of that section of the Act, hopefully only after having been properly advised by their union that the longer the employer continued to operate successfully with replacement employees the less likely it would be that they would ever find for themselves the economic leverage to force the employer to change his mind and to discharge the replacements in order to make room again for them. The longer the strike dragged on the worse the conditions became for the strikers.

7. Of course during the lengthy period of this strike, conditions affecting the employer changed as well. It is clear that at the outset of the strike the employer expected it to be relatively short - perhaps a matter of weeks or a few months at worst. This is evident from Mr. MacCallum's testimony that his employment by the company as a replacement employee was clearly understood by both parties to be "temporary". It is only natural that when the strike dragged on as long as this one did, the company's concern for and its view of its obligations towards its new employees would begin to change and eventually would take precedence over its concern for the strikers who in effect had said to the company that they did not wish to work for it on the company's terms any longer. They made that declaration by striking and they said it again six months later when they didn't take advantage of their rights under Section 73 of the Act to return to the company's employ. It is also quite natural with a new workforce unhampered by old work habits or collective agreement restrictions on productivity that the company's operating processes and procedures might change over such a lengthy period as this strike.

8. It is against that background that the evidence of Mr. Shaw must be weighed. His evidence is key because based on it the majority concludes (at paragraph 47) that the company did not "put its mind to assessing the productivity of the striking employees in relation to the employees hired as strike replacements". As I shall outline later, Mr. Shaw's evidence was exactly the opposite to that and, if weighed objectively, must lead to a conclusion opposite to that reached by the majority. The majority attempts to explain its dismissal of that evidence by holding that Mr. Shaw, although a son of the owners and a senior officer of the company, didn't know enough about the company's production processes to give credible evidence. That is tantamount to saying that an automobile company needn't honour its warranty if a faulty car was purchased from a salesman who wasn't a mechanic. According to the evidence, Mr. Shaw held the company's mandate to negotiate on its behalf and to commit the company to a binding collective agreement he judged suitable. Yet the majority chose to ignore or disbelieve his testimony despite the fact that there is not one bit of evidence to contradict what Mr. Shaw said. In assessing his credibility, it must be kept in mind that his company is small and that he is a senior manager in it responsible for a variety of business functions including marketing and labour relations. His evidence was that in both functions he had to be very conscious of labour costs. I quote an example from my notes which shows that he was asked in direct examination:

"Q. Why did you initially take the position (at the December 11th meeting) that you wouldn't retable your July 9th offer?

A. It was basically economics. In December we were negotiating three or four fairly large contracts. Negotiations were down to price as the determining factor against competition. We had to determine the bottom line on these business contracts in respect of price.

Q. These were contracts on sale of products?

A. Yes. In determining our bottom line price, we had to consider labour costs. Prices quoted were on existing labour costs and at the December meeting I was nervous that if we had settled the (labour) contract on our July offer and then been awarded those business contracts it could

have been a fairly substantial change and a loss to the company financially. In December we hadn't been given those contracts so even though I was nervous about it, I decided to table the July 9th offer".

In the face of such and other similar evidence, I cannot accept the majority's characterization of Mr. Shaw as an unqualified witness for the respondent. Mr. Shaw need not have an intimate knowledge of the specific job skills required by the intricacies of his company's production processes to bargain a collective agreement on the company's behalf.

9. If the *Charter of Rights and Freedoms* does not apply to employers in a case such as this for the reasons advanced by the majority (that Section 15 of the *Charter* applies only to individual persons, which, as I have said, I don't accept) it must follow that Mr. Shaw's evidence was given as an *employer* not as an individual protected by the *Charter* against the discrimination inherent in Section 89(5) of the *Labour Relations Act*. It therefore is that *employer* evidence, not Mr. Shaw's *personal* evidence, which this Board must weigh in determining whether or not the reverse onus has been met. The logical consequence which must follow from that is that Mr. Shaw's personal characteristics are irrelevant. That being so, then the Board's decision (not to give weight to his evidence) can be reached by the majority only by concluding that the company itself was unqualified to give evidence of its own labour costs. Such a conclusion is manifestly absurd.

10. Whether one accepts that or not, Mr. Shaw's evidence was clear. His penultimate back-to-work proposal was that strikers return in order of *job class* seniority as vacancies arose. He explained that this meant that if the company required a welder it would recall the most senior welder from among the strikers. Since that would be the most economic method of filling vacancies, it is evident on the face of the offer that the company was considering the relative qualifications of employment candidates when filling vacancies. The union objected to that approach and as a consequence the company changed its offer so as to recall to employment in such circumstances the most senior striker without regard to that person's ability to perform the work. In principle that was the method the union wanted through its "paper recall" proposal, except it also demanded that vacancies be created immediately through termination of replacement employees. Straight seniority as opposed to job class seniority was a potentially costly concession to the union yet the majority holds it against the company for having made it by concluding the employer "did not put his mind to assessing the productivity of the striking employees". One wonders whether the majority would have found otherwise if the employer had stubbornly held to its earlier position that only strikers immediately qualified to fill a vacancy would be recalled. Obviously not, and yet the majority concludes that in amending its offer to make it more palatable to the union the company did so without having put its mind to the effect that would have on its productivity. That is simply not a reasonable inference to draw from the evidence.

11. That the very opposite conclusion should be drawn can be illustrated by Mr. Shaw's testimony (and I again quote directly from my notes of his evidence in chief):

"Q. What was your reaction to the union's December 12th return to work proposal?

A. Pretty much as it had been the day before. We wouldn't be able to accept it.

Q. Why not?

A. To understand that, you need to know a little about how production works at our plant. We're a custom manufacturing facility. Virtually every product, the vast majority of orders we get, are different from the previous ones. We're not an assembly line facility. Every product is a different one. Consequently, once you've learned one product it doesn't mean you know them all. Some skills are fairly unique even in a world market. We're the leading manufacturer in the world of our products, but we face a lot of competition. As a result, we're constantly introduc-

ing new products, improving old products. It all adds up to the fact that virtually from month to month there can be significant changes in our products and manufacturing techniques. Because some of our equipment is for repairing mining equipment, most times delivery is very critical. So we have tight delivery, changing products, and since the strike had been on for twenty months at this point, procedures in the plant had changed drastically since the strike started. *To have tried to totally replace our work force in a very short period of time would have been a disaster from a production and subsequently economic point of view.* So we couldn't agree to the union's position which meant a complete turnaround of workers. But rather (we offered) a gradual integration of striking employees into the plant."

[emphasis added]

Mr. Shaw repeated the essentials of that testimony under cross-examination: that from an economic point of view the complete replacement in a short period of time of their whole workforce for the second time in two years just wasn't economically viable.

12. It is clear from that testimony that the plant's productivity, efficiency and economic viability was very much on the company's mind. Thus it cannot be said that the company failed to put its mind to the productivity of the strikers compared to those working. I believe the majority seriously errs in ignoring that clear evidence and in concluding (at paragraph 64) that "the express preference to retain employees who were hired after the strike commenced distinguished between the two groups of employees on the basis that one group participated in a legal strike while the other group did not" was made in a discriminatory manner contrary to Section 66 of the Act. There simply is no evidence of that nor is it a reasonable inference to draw from the facts before us. Rather, the evidence is that the company preferred to retain its current workforce because its previous one would require costly retraining. The company did distinguish between the two groups but not for the motive alleged. It concluded that the replacement employees were now more qualified to do the changed type of work being done in the plant than the strikers. It was willing to take the latter back and to retrain them, but as vacancies arose, not all at once for the reasons outlined in Mr. Shaw's testimony.

13. The statement by the majority at paragraph 67 is also directly contrary to the evidence. The majority says: "the respondent's offer to recall employees by seniority as vacancies arise did not take into account that a senior employee might not have the skills necessary to perform the vacant job". That is precisely why the company's penultimate offer was to recall by job class seniority so that those recalled first would be the ones with the skills necessary to do the vacant jobs. When the union objected to that, the company agreed to amend its offer so as to recall by straight seniority instead. Unfortunately, it seems that no matter which position the company took the majority would find against it.

14. Mr. Shaw's evidence was so clear and uncontradicted that I find it unnecessary to have recourse to the reverse onus provision in Section 89(5) of the Act. On the balance of probabilities it seems clear that the company was motivated by business considerations for adopting the back-to-work protocol it offered to the union, and that it was not motivated by a desire to discriminate improperly against the strikers. Even under the more stringent test of Section 89(5), I conclude the company has met the onus placed upon it. The conclusion of wrong-doing is simply not a reasonable inference to draw from the facts.

15. I agree with the majority's preliminary finding that the company's bargaining was in good faith and therefore that no violation of Section 15 of the Act occurred. The evidence is quite clear that the company was prepared to sign a collective agreement. It dropped potentially contentious positions on reprisals against certain strikers for damage done to its premises during the strike and other picket line incidents, it dropped its insistence on return to work by job class seniority and

agreed to straight seniority instead. A collective agreement could have been signed on December 11th/12th but for the union's uncompromising position that all strikers had first to be returned to employment before any strike replacements could be retained. Since I disagree, for the reasons already mentioned, that there was any violation by the company of Section 66, I cannot agree with the majority's subsequent finding that the company had an improper motive in maintaining its back-to-work offer and therefore failed to bargain in good faith.

16. I also disagree with the majority's conclusion that Section 64 of the Act has been violated. We heard no evidence from the union to support that claim nor is any rationale offered by the majority to justify its finding.

17. Counsel for the company argued that in making its final back-to-work offer the company relied for its legality directly on the *Mini Skools* case (see *Mini Skools Ltd.* [1983] OLRB Rep. Sept. 1514). The Board in that case had quoted with approval from re. *Fotomat Canada Limited*, [1980] OLRB Rep. Oct. 1397 where (at 1430) the Board stated with respect to Section 73 of the Act:

For the first six months of any strike, striking employees have a right to their former jobs on making an unconditional application to this effect with their employer. The only qualifications are where the work is no longer being performed or the employer has ceased operations. The employer cannot refuse the application because another employee is performing the striking employee's job and there are no other vacancies. The striking employee must be returned to his former job even if this results in the layoff, transfer or termination of employment of the replacement employee.

The effect of Section 73 of the Act is that, after the expiry of the six months period, the job security of the replacement employees vis-a-vis the strikers is reversed:

As a strike endures, the commitment of an employer to the employees who have helped it resist the strike may become great and, in the usual case, it is for the negotiation process to reconcile this commitment with the interest of striking employees to return immediately to their jobs. Where the trade union is unable to negotiate their immediate return because of the employer's commitment to replacement employees, striking employees who make an unconditional application to return have to be treated, essentially, as employees on layoff and must be considered in filling subsequent vacancies. (at 1430)

[emphasis added]

It will now come as a considerable shock to the industrial relations community in Ontario to learn that a refusal by an employer to offer immediate recall to strikers for valid economic reasons at the expense of the continuing employment of an equal number of replacements, is illegal after the six months period has elapsed. If the majority has taken into account that impact of its decision it is remarkably well disguised. Section 73 of the Act represents the will of the Legislature of this Province. It is society's way of balancing the interests of the employer, the strikers and replacement employees when, as here, an impasse occurs. It is in my view wrong for this Board to thwart and circumvent the intent of the Legislature by the circuitous device of finding that the employer's offer of an economically sensible phased-in recall to employment of strikers was designed instead to punish them. Anything less than immediate return to employment of all strikers obviously could be viewed as punishment by those so inclined. However, such a conclusion is a mistaken interpretation of the intent and meaning of Section 73, and the error is compounded in this case by the majority's inappropriate and capricious assessment of the evidence.

18. If the intent of the Legislature was that every striker had the absolute right to return to his job (subject only to its still existing) even after expiry of the six months period, then Section 73

would have no meaning or purpose. If that was the intent and such right were denied, other sections of the Act dealing with unfair labour practices could be invoked to resolve the problem. But Section 73 exists and this Board has the obligation to apply it. That section of the Act inherently infers that it is legal after the six months period to retain replacement employees and to re-engage strikers only as vacancies occur if work is not immediately available for all of them. In effect the Legislature has said that that type of return-to-work arrangement is not illegal discrimination against a striker. I conclude that the majority has erred in law in interpreting that section otherwise.

19. Since the majority's decision represents a changed and thus new interpretation of the Act, the financial penalty imposed *retroactively* by the majority upon the company is totally inappropriate. The company believed that its offer was legal. It was led to that belief by reliance in good faith upon earlier decisions of this Board in similar circumstances or where similar interpretations of the principles inherent in Section 73 were involved. Where the rules of the game are changed on it in mid-stream, the first company to face this new interpretation should not be burdened with the maximum penalty for a violation of the new rules. If there has been a violation of the Act as found by the majority, a finding with which I disagree, there should at most be direction to the company to make a new offer without the total retroactive pay ordered by the majority and without reimbursement of the union's costs. To make the finding it has, and then to compound the inequity by retroactive financial application of a new interpretation of the Act is, in my view, a denial of natural justice as is ordering reimbursement of the union's costs when no evidence was heard to support the finding of a contravention of Section 64.

20. Furthermore the union did not attempt to mitigate its or the strikers' losses by accepting the company's final offer on December 12th, 1984 and getting back into employment as many strikers as possible as quickly as possible before pursuing other avenues in law open to it. The evidence before the Board is that there has been a regular turnover among the replacement employees since their initial recruitment began over three and one-half years ago. Given the excessive delay in this decision (it is now over two years since the impugned bargaining of December 11th/12th, 1984 which gave rise to the complaint) and given the employee turnover of which we heard evidence, it is highly likely that most if not all of the strikers interested in returning to work for the company would by now have been accommodated. I recognize that the majority has made its financial penalty subject to "the usual rules of mitigation". In view of all the circumstances of this case such a ruling will likely simply lead to more discord and further unnecessary hearings before this Board. As I have argued, there should be no financial penalty for a retroactive application of new law; if there is to be one, the manner of mitigation in these unusual circumstances should have been specified as outlined above for the benefit of the parties.

21. In summary I would dismiss the complaint. I believe the Board has erred in its interpretation of the *Charter* and the Act, has failed to consider adequately and appropriately the evidence before it, and has denied natural justice to the respondent company.

0368-82-U; 0370-82-OH; 0376-82-U; 0613-82-OH Toronto Civic Employees Union, Local No.43, Canadian Union of Public Employees, Applicant, v. **The Corporation of the City of Toronto**, Respondent; John McLennan, Charlie Wadsworth, Nehemiah Thompson, Danny Lowe, Toronto Civic Employees Union, Local No. 43, Canadian Union of Public Employees on its own behalf and on behalf of 400 persons employed in the Sanitation Dept. of the Corporation of the City of Toronto, Complainant, v. The Corporation of the City of Toronto, Respondent; The Corporation of the City of Toronto, Applicant, v. Metropolitan Toronto Civic Employees, Union Local No. 43 and J. Mele, Business Agent, and W. Brady, D. Jeanes, G. Terrell, C. Greco, C. Philipidis, R. McAdam, T. Cantwell, J. McLennan, D. Schaffer, P. Ferguson, L. Kovacs, Respondents; Canadian Union of Public Employees, Local 43, on behalf of the grievors named herein, Complainant, v. The Corporation of the City of Toronto, Respondent

Health and Safety - Lock-out - Strike - City sanitation workers collectively refusing to wear safety vests - Work stoppage continuing for several days - Employee conduct constituting strike rather than *bona fide* refusal to work because of safety concerns - No remedial direction other than declaration of unlawful strike

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members W. H. Wightman and Stewart Cooke.

APPEARANCES: H. Goldblatt, J. Egner, Les Kovacs and Joe Mele for the union and the individual respondents in Board File No. 0376-82-U; B. M. Paulin and J. R. Hassell for the Corporation of the City of Toronto.

DECISION OF THE BOARD; December 2, 1986

1. These are related complaints brought pursuant to sections 92 and 93 of the Labour Relations Act and section 24 of the Occupational Health and Safety Act ("O.H.S.A."). For ease of exposition, the Corporation of the City of Toronto will be referred to as "the employer" or "the City", and Local 43 of the Canadian Union of Public Employees will be referred to as "the Union".

I

2. On May 19, 1982, there was a work stoppage. City sanitation workers refused to wear their fluorescent safety vests. The City told them that if they did not wear their vests they could not work at all. The City threatened suspensions. The work stoppage continued for several days.

3. These events sparked a variety of proceedings before this Board. The City claimed that the employees were engaging in an unlawful strike. The Union contended that they were exercising their rights under the *O.H.S.A.*, because the safety vest was unsafe. The union argued that the suspensions were an unlawful reprisal under the *O.H.S.A.* and an unlawful lock-out under the *Labour Relations Act*.

4. The hearing in these matters was scheduled to begin on May 25, 1982. Prior to the hearing, the parties met with the Chairman of the Ontario Labour Relations Board to see if some interim compromise could be arranged. The meeting was successful. The employees agreed to

return to work immediately, wearing brightly coloured reflective strips attached to their orange work shirts. Work resumed the following day.

5. This Board-inspired compromise satisfied the City's concern about employee visibility. It satisfied the Union's concern about the use of safety vests. It satisfied the public's concern about the interruption of garbage pick-up. It has remained in place, without incident, for almost four and a half years. With the passage of time, the interim arrangement has begun to look increasingly permanent. An impartial observer might conclude that the events of May 1982 have become academic - of interest to the historian, not the adjudicator.

6. Nevertheless the hearings in this case dragged on over twenty-two days scheduled sporadically over three and a half years. We say "sporadically" because, despite periodic assertions concerning the "principles" at stake, neither party showed any consistent appetite to get on with the matter. Scheduled hearing days were routinely cancelled, at the parties request, for reasons as diverse as the convenience of counsel or to accommodate the City's annual employee picnic. Months intervened between one block of hearing days and the next, as counsel laboured mightily (and quite sensibly in our view) to persuade their clients that litigation before this Board was a costly and imperfect mechanism for resolving any residual concerns that they still might have. The Board willingly acquiesced in these consent adjournments on the principle of "let sleeping dogs lie". The litigation could - and eventually did - consume an immense amount of Board time and taxpayers' money which could be more profitably devoted to more pressing matters. If the parties were not anxious to pursue the case, why should the Board be concerned? Even after the case was completed there was some prospect that the hearings had had a cathartic effect, and that the parties would be able to compose their differences without a formal decision. Unfortunately, all hopes for a settlement proved to be illusory.

7. We mention these matters not as criticism of the parties' counsel, but rather to underline the difficulty faced by the Board in assessing testimony tendered, intermittently, by quite a number of witnesses, over a period of three and a half years. During the course of the hearings, we were presented with voluminous oral and documentary evidence as to the witnesses' respective perceptions of "the facts". Not surprisingly, these perceptions were significantly different on material points and some of the evidence was simply not credible. Whether by default or design, some of the testimony, of some of the witnesses was shaped by their own interests or their desired outcome of these proceedings; and where the testimony was obviously slanted, unresponsive, or evasive we have taken that into account. More commonly, however, the witnesses simply could not remember the precise pattern of events in an emotional and volatile situation occurring some years before. They were, quite frankly, confused, and thus particularly receptive to suggestions by counsel about what "might have been". These problems merely complicate the Board's task in a case in which we are called upon to assess employee motivation and draw inferences from what was said or done in 1982.

8. It is neither necessary nor practical to set out in these reasons the sometimes contradictory testimony of the many witnesses who were called, or to catalogue those parts of their evidence which we find to be credible, credible but sometimes mistaken, credible on certain points but not on others, credible but unclear, and so on. In our view, it is sufficient to sketch in an overview of the events precipitating the work stoppage, and the steps which the parties took to resolve it. In so doing, we have taken into account the demeanor of the witnesses when giving their evidence, their performance under cross-examination, the clarity, consistency and apparent quality of their recollections, the reasonableness of their version of the facts in light of contradictory evidence, their ability to be objective and resist the influence of self interest, speculation, or personal opinion, when giving their evidence, and what, in our view, seems most probable in all the circumstances.

II

9. John Willis became the Director of the City's sanitation department in January 1981. He decided that in the two or three years left to him before his retirement, he should do something to improve the working conditions of the City's sanitation workers. He decided that they should have a new uniform so that they would "look sharp" to the public eye. He also decided that they should wear a safety vest to improve their visibility when working in public roadways.

10. Willis discussed the matter of safety vests with his immediate subordinates, and decided that it would enhance the employees' safety if they were required to wear a fluorescent, vest similar to the one worn by approximately 900 employees in the City's operations department. On June 12, 1981, a memo was posted, advising all employees that, henceforth they would be required to wear the vest or face disciplinary action. That memo reads as follows:

"In the interest of safety, you are being supplied with a regulation safety vest which you are to wear at all times while on duty. This regulation is in accordance with section 26(b) of The Occupational Health and Safety Act, which states:

A worker, who may be endangered by vehicular traffic while he is working on a public way, shall wear a vest which shall be reflective fluorescent and coloured blaze orange or red.

Failure to comply with this direction may result in disciplinary action. Govern yourself accordingly."

11. There was very little investigation or study prior to instituting what was to become a *mandatory* piece of safety equipment. Willis discussed the matter with his immediate subordinates and with some officials in the Operations Department, and decided that it would be "a good thing". Only one of those subordinates had experience working on a garbage truck, and that was twenty years ago. There were no field tests to ensure that the vest was appropriate nor any consideration of the possibility that the design of the vests might not be suitable for the kind of work in which the employees were engaged. The alternative of "Sam Brown style" safety straps was rejected because, it was thought, they could potentially become caught in material which the employees were carrying, but it was apparently determined that the proposed safety vest did not pose the same problem. Having seen the safety vest, we are not sure how Willis came to that conclusion. There was no discussion with the Union-Management Health and Safety Committees or the City's central health and safety co-ordinator - despite the City's own statement on occupational health and safety policy. That policy reads in part as follows:

"A joint management-employee occupational health and safety program will be established to develop training programs, and provide employees with safe working procedures, safety regulations and protective equipment required to ensure the health and safety of all employees.

...

The active involvement, co-operation and support of management and employees is encouraged in all matters relating to occupational health and safety in the work place."

Whether or not consultation is required, it is obviously contemplated in the City's safety policy, and is certainly prudent; however Willis thought it imperative to introduce the vest immediately.

12. What was the urgency? There was none at all. Willis admitted that on the basis of his forty years experience, he was unaware of any accident or injury which might have been prevented by wearing a safety vest. Vests of that type were neither prescribed by law for sanitation workers nor in widespread use by sanitation workers at other Ontario municipalities. Nor was there any-

thing in the employees' work situation which demanded an immediate response. There had been no injury or other work-place incident highlighting the need for a safety vest.

13. But, for Willis, it was not a question of necessity or of implementing the City's established safety policy. It was a matter of his "management rights". There was no need to consult with the employees, their Union or other City officials. He had the "right" to proceed, and he did so. Why consult with anybody else or delay the implementation of what he considered to be a desirable change? Why become involved in discussions with the health and safety committees or the City's safety staff? At various points in his testimony, Willis made these in comments:

"I felt it was time to get on with it without further to do or talking to anyone else. I felt it was my prerogative and I did it. I didn't want to be embroiled in City Hall or we would never get it done."

"If I got involved with Renaud [the City's safety co-ordinator] it would have taken a lot of time ... Everyone would ask for reports and we would have reports coming out our ears while the guys were unprotected."

"Rightly or wrongly, I felt that it was imperative that employees be given equipment as soon as possible... not after weeks of reports and bickering back and forth... I thought it was my prerogative."

"It was my prerogative and responsibility. I wasn't trying to do an end run on the safety committee. I didn't discuss it with [Ray Bremner, the Commissioner] since it would have increased the time to put it in."

Curiously, Willis was prepared to consult at length about the colour and fabric of the new uniform but not at all about the new safety vest.

14. Willis knew that the *O.H.S.A.* regulation mentioned on the June 12 directive had no application to the City's sanitation employees. The regulation was intentionally taken out of context. Willis misrepresented the law in an effort to persuade employees to wear their safety vests and defuse any potential employee objections. If employees were led to believe that they were legally obliged to wear the vests, perhaps they would not complain. The fact that the union or the employees might take offence at this clumsy lie, does not seem to have occurred to him.

15. It would be difficult to construct a scenario more likely to provoke an adverse employee response. A piece of compulsory safety equipment was introduced without study, without field tests, and without consultation with either the employees' representatives, the health and safety committees, or the City's own safety specialists. Established channels of communication were bypassed entirely because of Willis' view of his "management rights", and the changes were accompanied by a threat of discipline and an intentional misrepresentation of the employees' legal obligations. Yet, at the same time, there was no objective justification for such unseemly haste, other than Willis' personal view that this was a "good idea" which should be implemented immediately.

16. In the months that followed, there was an entirely predictable degree of employee resistance, and numerous complaints. The vests were said to be "hot", "uncomfortable", and "unnecessary". They could not be adjusted to fit snugly against the body so that they had a tendency to "snag", "get caught on things", or become entangled with some of the refuse which the workers were required to pick up and load into the garbage trucks. Brush, wired objects, or wood with nails, were cited as examples. Truck drivers wearing the vest complained that it got caught on door handles as they were getting out of their vehicles. And, to make matters worse, the vest was constructed of a vinyl material which, unlike ordinary cloth, would not rip or give. In one case an

employee getting out of his truck found himself "hung up" and suspended in mid air because the vest was easily able to sustain his weight. In another case ("the Durnin incident") an employee was almost dragged into the hopper of a garbage truck when his vest became caught on a nail and another employee (David Schaeffer, chief steward at Booth Avenue yard) negligently activated the hopper mechanism without first ensuring that Durnin was clear. No injury resulted because the machine cycle was immediately aborted. In retrospect, and with the benefit of hindsight, G.E. Pentz, Co-ordinator of Resources and H. Rauenbush, General Supervisor, both testified that the vest might have been a contributing factor in Durnin's potential accident. That conclusion is actually reflected in the language used at the time:

It was concluded from the demonstration of the incident by Mr. Durnin that human error through a sequence of events was the cause of the incident not just the safety vest in question.

Even Mr. Willis now concedes that reasonable individuals could differ about the utility of the safety vests.

17. Most of the early employee complaints had to do with the comfort, necessity, or suitability of the vest, rather than any overt safety concerns; and these complaints were probably influenced, to some extent, by the manner in which the vest was introduced. There was a good deal of grumbling, and the City was suspicious that the objections were being manufactured and the problems exaggerated by David Schaeffer among others. At lower levels of management, the complaints were noted but nothing was done. When the Union brought such complaints to higher levels of management, they were attributed to a natural employee reaction to any change, or discounted because the complaints "lacked specifics".

18. As early as June 18, 1981, the Union had obtained the opinion of a Ministry of Labour official who confirmed that the *O.H.S.A.* regulations *did not* apply to sanitation workers. His letter goes on to suggest:

With respect to the wearing of certain types of illuminated safety vests by sanitation workers, I would suggest that the matter be reviewed and resolved through the Joint Health and Safety Committee.

19. Complaints did surface at the divisional health and safety committees where they were duly discussed, routinely recorded, and went nowhere. Minutes of health and safety meetings were prepared, circulated to higher levels of management, authorized, initialled, and filed away. James Gordon, a foreman at the Booth Avenue yard and a member of the local health and safety committee said that no action was taken because there was no local responsibility to investigate or follow up on complaints. It was sufficient to make a note of them and forward the information to the City's central health and safety committee. Mr. Rauenbusch, on the other hand, testified that he did not think that there was any responsibility for the central committee to "follow up", because there were no "written complaints", "no details" and, particularly, no specific recommendations for action from the local committees. It is difficult to resist the conclusion - acknowledged by both City and Union witnesses - that, at the time, neither the system of employer-employee communication, nor the health and safety committees were working very well.

20. Of course this does not substantiate the employees' alleged health and safety concerns, and the administrative difficulties may be attributed, in part, to the fact that the *O.H.S.A.* was still relatively new. But it does highlight a failure to deal with a festering labour relations problem which erupted on May 19, 1982.

21. The other forum in which employees raised concerns was the grievance arbitration procedure established under their collective agreement. Once again, David Schaeffer, was at the cen-

tre of the controversy. On June 18, 1981, he submitted several grievances on behalf of employees who had received written warnings about their failure to wear their vests. These identically worded grievances all complain that the vest is "hazardous to health and safety" because of "extreme physical discomfort (heat)". His own grievance includes the suggestion that a more brightly coloured uniform with luminous strips might be a satisfactory alternative. Some three months later, on August 18, 1981, Mr. Schaeffer filed three more grievances, including another one of his own, protesting the receipt of a one-day suspension for failing to wear his safety vest. Once again, he claimed that the vest was "unsafe" and should be removed.

22. The Schaeffer insubordination grievance was referred to arbitration pursuant to section 45 of the *Labour Relations Act*. A hearing was held, in Toronto on October 20, 1981. The arbitrator concluded that the circumstances of Schaeffer's refusal to wear the vest did not involve either an *honest* or reasonable belief that his health or safety were being jeopardized. Schaeffer had set out to "make an issue" of the safety vests, and had been intentionally insubordinate. His complaints were exaggerated and self-serving. The complaint about "snagging" prompted this observation:

"At the hearing, the grievor demonstrated his concern that garbage in the form of wood or nails, snags on the vest and in throwing it into the packer of the truck he could be carried along with it. Clearly, normal care to avoid snagging would eliminate the nuisance. In the case of the grievor, a strong man of apparently more than two hundred lbs. weight, the suggestion that he can be pulled off balance by a piece or bundle of garbage that he has thrown and be carried with it into the packer, I do not find to be reasonable in the circumstances. While his evidence did convince me that he was frustrated as counsel maintained, I felt this to be due more to the fact that he had so far been unable to convince anyone in authority to his point of view rather than due to an honest belief that his health and well being were in serious danger. I do not find his action in purposely neglecting to wear his safety vest justified in any way by the difficulties he claims to have experienced when using it. On the contrary, I find that he has failed to establish a reasonable cause to disobey the instruction which had been issued for his safety."

23. With the dismissal of the Schaeffer grievance the related grievances were withdrawn. There was no effort by the Union to file a policy grievance, launch a complaint under section 24 of the *O.H.S.A.* or otherwise involve the Ministry of Labour - despite the fact that there has been regular contact with Ministry officials in connection with other safety concerns which the Union has raised. If the safety vest was the hazard the Union now claims it to be, justifying a mass refusal to work, why were these obvious steps not taken?

24. The answer, we think, lies in the equivocal position the Union was forced to take with respect to the safety vests. The union had long complained about the practice of picking up garbage, simultaneously from both sides of the street ("maintaining"). The union preferred the "belt-lining" technique, in which the truck goes up one side of the street and down the other. There had been a work stoppage over that issue, and having argued, vociferously, that the employees were exposed to danger when required to crisscross the streets collecting garbage, the Union could not condemn efforts by the City to enhance their visibility - particularly on winter mornings, at dusk, on the night shift, or during bad weather. This ambivalence is reflected in a letter from Leslie Kovacs, the President of the Union to Mr. P. O'Reilly a Ministry of Labour official, dated November 23, 1981:

I would like to inform you that we are finally coming to an amicable solution of the Safety problem arising out of the need to cross the street while collecting refuse in the City of Toronto.

As you know, the interim solution offered by the Sanitation Section of the City's Works Department was to issue the type of red vests that "Flagmen" wear on road construction. We did appreciate the quick reaction of the Works Department in supplying the Safety Vests.

In 1981 we have had a number of meetings with Works Management and have come to an agreement to supply employees on Refuse Collection with new coveralls that are RED in colour. The summer issue of pants and shirts would be the same red colour.

We feel that this new "RED" work attire will be the best possible safety measure that the department could institute, and we are in agreement with it.

If you would like to inspect the new coveralls, please contact Mr. Jim Willis, Director of Sanitation, as I understand that samples for the use of one crew in each yard for a trial has been delivered.

We would be interested to hear your opinion on this new development.

25. This letter reflects the Union's view that the safety vest was only an "interim solution" which would be replaced when the employees were issued new uniforms. There is no suggestion here that the vests are dangerous - only that they may not be the most suitable alternative. The letter also indicates the ease with which the Union could communicate its safety concerns to the Ministry. If the safety vests were really a "safety hazard" as the Union now claims, there was no reason why it could not have brought that allegation to the Ministry's attention. By late November 1981, the employees had been wearing vests for more than 6 months, and, according to the Union, there had already been numerous employee complaints, a number of grievances, and a full investigation of the "Durnin" incident, upon which the Union places so much reliance in these proceedings. Schaeffer's grievance had raised the issue squarely; and a perusal of the arbitrator's award reveals that many of the problems and complaints relied upon before us, were canvassed before him in October 1981. By November 1981, the union's safety concerns - if there really were any - had been clearly identified. The union had no difficulty inviting O'Reilly to inspect the new coveralls. His opinion was solicited. Yet no one invited O'Reilly or any other Ministry of Labour inspector to consider the problems with the vest. A phone call would probably have been sufficient, because the inspectors have wide powers to investigate and rectify potential safety hazards. Why was this simple step not taken?

26. In our view, the most plausible inference is that the Union did *not* regard the vest as a "safety hazard". The vest was an acceptable, if "second best solution", to the problem of employee visibility, which should be worn until some suitable alternative was implemented. In the Union's opinion, that alternative was the brightly coloured uniform which was eventually issued to employees on May 19, 1982, the day of the work stoppage.

27. The union's position on the continuing need for the safety vests is repeated in a letter from Kovacs to Willis dated April 27, 1982 - approximately three weeks before the work stoppage. That letter reads as follows:

"In the last twenty years there had been no change in the workwear issued to employees working on refuse collection trucks. At the same time, over the last ten years the character of the job has undergone considerable change.

The service to the public improved measurably by replacing the labour intensive open trucks with back loading packers, which is a significant improvement. However, further changes were also necessary.

The increased need for safety of employees come into sharp focus. The Union working in co-operation with you in the Sanitation section of Works Department has made a number of improvements in work procedure, safety awareness, workboots and safety equipment.

In 1980 we had joint discussions on the need to improve the coveralls, pants and shirts the department issues to employees. Samples of material has been distributed to employees in early 1981 for comment, material that would become the base for new workwear.

In the interim period safety considerations necessitated the use of safety vests that are designed primarily for construction flagman and other jobs that do not require hard physical labour or many miles of walking.

Over the last year that employees have been required to wear the vests a number of serious problems have emerged. While working the vest have a tendency of hooking on door handles on the cabs, fences and hedges. Although it has stretch capacity in the winter it was extremely difficult to put on over parkas and in wet weather, any clothing. In the summer inspite of the mesh construction it was hot and caused perspiration that limited arm movement making the work more arduous. The employees are definitely opposed to continued use of the vests if a suitable alternative method is found.

We believe strongly that NEW coveralls with the RED colour will be an ideal replacement for the vests. Since the coveralls will be made out of the red material, there will be a greater area of outstanding color as a safety measure.

In the opinion of the Shop Stewards, and other employees the proposed red coveralls and red shirt for the Sanitation employees will be a vast improvement in all facets of safety concerns.

On behalf of Local 43 and our members in your department I want to stress that our decision to ask for the removal of the vests is based on study of all pertinent facts, and we are willing to take the responsibility for the decision to change the vest for the new design red coveralls."

There is no definite assertion here that the vest is unsafe - although it is clearly regarded as unsuitable and unnecessary if the employees have a brightly coloured uniform. Copies of that letter were sent to all Shop Stewards in the Sanitation Department.

28. Kovacs's letter mentions the ongoing consultation with respect to the employees' new uniforms. Samples of the uniform material were distributed to the employees for comment. The proposed material was bright orange. Willis and Rauenbusch both testified that the selection of this colour was made without *any consideration whatsoever* that it would make the employees more visible. We find that hard to believe. Even accepting Willis' suggestion that he wanted the workers to "look sharp", why else would anyone choose bright orange? That testimony is also inconsistent with some earlier testing of brightly coloured red coveralls.

29. On the other hand, the Union's canvass of employee opinion was not an entirely neutral event. The canvass took the form of petitions, asking the employees to approve the material which was being "recommended for your protective clothing". At least one of those petitions contained the notation that "if this material is used it will eliminate the safety vests", and regardless of the wording on particular documents that was the message conveyed to employees by the individuals circulating the petitions. The employees were led to believe that, once the new uniforms were issued, the safety vests would no longer be required. The two events were inextricably linked.

30. The difficulty was that, regardless of the Union's demands, or its hopes, or the employees' expectations, this was not the employer's intention. Willis made it abundantly clear, again and again, that the new uniforms would *not* replace the safety vests. The employees would be required to wear *both* the new uniform and the vest, which, in Willis' opinion (with which we agree) had superior reflective qualities. The uniform was bright, but it did not show up as well in poor light. However, despite the employer's clear and unequivocal statements to the contrary, Union officials led employees to believe that the vest would be removed. As Joe Mele, the business agent commented "we kept telling the guys the new uniform was coming in ... put up with it [the vest]... it's coming ... I guess everyone like me thought the new uniform would solve the problem". It didn't.

31. On May 14, 1982, Union officials met with Willis and his subordinates to review the matters set out in Kovacs's letter of April 27, 1982, and the problems which the employees were

supposedly having with the vest. There was an undercurrent of concern about threatened "job action", which management had learned about "from the grape vine". The City was worried about a strike.

32. The Union confirmed that there would be real difficulties when the new uniforms were issued if the employees were still expected to wear the vest, because the employees did not think that it was necessary - a view which, of course, the Union shared and had intentionally fostered. However Willis continued to maintain that the new uniform was *not* a replacement for the vests, nor would he undertake to delay the introduction of the new uniforms. He said he would make no promises, but agreed to meet the following Friday, (May 21) to consider the matter further. That meeting was subsequently re-scheduled to May 19, the day on which the new uniforms were issued.

33. The testimony concerning May 19 is important, but it was often confused, contradictory, or obviously shaped by the various witnesses' personal preferences about the result of these proceedings. Once again, we have tried to set out our factual findings based upon what we consider to be the most credible and reliable evidence. In so doing, we have not neglected the "gloss" put on the evidence by counsel, however we have come to our own conclusions.

34. The Union describes the events of May 19 as a spontaneous work refusal prompted by the employees' reconsideration of their personal safety on the day their new uniforms were issued. In the Union's submission, the employees' actions were not planned, premeditated, or concerted. The vest had been in general use for some time and had always been a matter of general concern. It is quite understandable that a number of employees, upon reflection, might come to the same conclusion: that the vest was unsafe and that a work refusal was justified. However, in our opinion, this characterization is not an accurate picture of what happened.

35. In the first place, this so-called spontaneous reaction was predicted (quite accurately as it turned out) by Union officials the week before, and, as we have already mentioned, their own actions had effectively set the scene. While the work stoppage may not have been actively orchestrated at all four locations, (we shall return to that issue later) Union officials knowingly created the expectation that the new uniform would replace the vest - which, of course, was the Union's objective, as evidenced by Kovacs's letters of April 27, 1982, and November 23, 1981. The Union may even have believed that the new uniform *should* replace the vest, but we find (despite some witnesses' denials) that it fostered the belief that it *would* do so, and did not disabuse employees of that notion, even though it was well aware of Willis' statements to the contrary.

36. Ray Rigby, a labourer/driver at the King Street yard thought that the new uniform would replace the vest. So did John McLennan, the chief steward at the King Street yard who said "everyone figured it would get rid of the vest". John Burke, a labourer, described the new uniform as "the break through between management and the City employees". For Burke, the replacement of the vest by the uniform was the outcome of a bargaining process. Even Joe Mele, the Union's business agent, who was well aware of Willis' position, testified that he took it for granted that the vest "would go" when the new uniform was in place. His remarks to employees have been set out above. In the circumstances it is not surprising that there was an employee reaction when they were advised that the new uniform would *not* replace the vests.

37. Nor is it so obvious (as the Union argues) that the work stoppage was entirely spontaneous, without specific design or prompting - bearing in mind, as we must, that it involved some two hundred and sixty employees working at four geographically separate locations, and that those same employees had been wearing their vests for almost a year without a single compensable accident or injury. At Booth Avenue, Henry Rauenbusch recalls that it was David Schaeffer who, shortly after 7 a.m. advised that the employees were refusing to work because the safety vests were

unsafe. Rauenbusch had the employees assembled and told them that there was work available if they were prepared to wear their vests, but Schaeffer interjected “we don’t want to wear vests in unsafe conditions, do we boys?”, which produced a unanimous “No”. That morning, James Gordon, a foreman, recalls seeing Schaeffer conducting a meeting, and while he could not recall Schaeffer’s exact words, he did conclude that the meeting was about the safety vests and witnessed Schaeffer calling for a show of hands.

38. Schaeffer was called by the union to rebut these suggestions. We did not find him to be a very credible witness. He was evasive and prone to exaggeration. However, even his own evidence suggests that he had a hand in organizing the protest at Booth Avenue.

39. Schaeffer testified that he had been advising employees that the vest was unsafe ever since his lost arbitration case, and that he had repeated that assertion to a number of employees *on May 18, the day before the new uniform was issued*. He said that he had decided, on his own, that he would not wear his safety vest with the new uniform, that he planned to claim the protection of the *O.H.S.A.*, and that on May 19, when he came in to work, a number of employees seemed to be waiting for him. He said that he had never discussed a work refusal with employees. They had discussed it with him, and on May 19 he addressed a group of employees milling around, to the effect that it “seemed” that they had a serious problem because they had indicated they wouldn’t wear their vests and were using “Bill 70” as they had a right to do.

40. When Louis Vandenbossche, acting supervisor at the Yonge Street yard arrived work at about 7 a.m., he was asked to direct the employees to the lunch room so that a Union official named McCallister could address them. Thereafter, some employees told him about their safety concerns and one asked if there was a meeting next Friday - referring presumably, to the further meeting to discuss the vests which Willis had promised. When advised that there was such meeting planned, the employee said “Okay let’s go out” (i.e. let’s go to work since the issue will be discussed on Friday). For him, at least, it seems that so long as the employer was negotiating there was no need to take action or apply pressure and about 100 employees at Yonge St. did go out to work. At Symes Road yard, Stan Gourley, the Superintendent, saw two Union officials at about 7 a.m. talking to the employees in twos and threes. He was subsequently advised that the employees did not want to work with the vest over their new uniform.

41. But what was the workers’ concern on May 19? Did they really have reason to believe that if they went out to work that day, wearing their vests as they had done for the previous eleven months, they were “likely to endanger” themselves - to adopt the words of section 23 of the *O.H.S.A.*? Were they refusing to work because of legitimate personal safety concerns, or were they responding to their employer’s refusal to withdraw the safety vests as their Union had requested and had led them to believe would happen when the new uniforms were issued? Did the work stoppage result from a perception of personal peril, or was it a collective protest over an unpopular decision, and a pressure tactic to force the City to rescind the vests?

42. Those questions are at the crux of this case and, it is therefore interesting to note, that virtually all of the Union witnesses admitted that the employees were prepared to wear the vest with the *old uniform* but not the *new* one. As Les Kovacs put it, they were prepared to “suffer one, but not the other”. The employees told him that they thought the new uniform was visible enough and that wearing a reflective vest over an orange uniform “made them a laughing stock” or was a “parrot costume”. John McClennan, chief steward, at King Street, said that the problem was triggered by the requirement to wear the new uniform and the vest. Employees were prepared to go out to work with the vest and their old uniforms. At the Symes yard, union officials Bob Casey and Jack Tomerson advised employees to do just that.

43. Ray Rigby from the King Street yard, testified that he and other employees were prepared to wear the old uniform and vest, and added that a number of employees had put on their vests over the new uniforms but later took them off when they saw what others were doing. Even David Schaeffer admits that had it not been for the issue of the new uniforms, the employees would have routinely gone out to work wearing their vests, as they had for the past eleven months. He said that the reason they had refused to do so was because, in their view, the vest was no longer necessary. That was certainly Schaeffer's opinion. In a later meeting in the Mayor's office, Joe Mele, the business agent, indicated that employees would be prepared to preserve the status quo (i.e. the vests and their old uniform) if they were asked to do so, and quite a number of employees did go out to work wearing their old uniforms and vests, including the night shift workers. In discussions with the City, the Union even agreed that the probationary employees should continue to work wearing their safety vests, despite the fact that the probationers have the same protection under the *O.H.S.A.* as their fellow employees (whatever rights they may have under the collective agreement). If the vest was really unsafe, as the Union contends, why did the Union agree that the probationers should continue to wear it? Were the probationers less exposed to danger, or did the union know that engaging in an unlawful strike might have serious ramifications for probationary employees with limited rights under the collective agreement? If the safety of the vest was a valid concern, why were the employees, including Schaeffer, prepared to go to work wearing the vest with their old uniform?

44. We neither doubt nor minimize the frustration of employees who are compelled to wear a piece of equipment which may be neither necessary nor suitable, and may not even be the best alternative to accomplish the objective which the City itself had defined. However that frustration (undoubtedly fueled by the City's own sloppy handling of the matter) does not justify a strike or convert the employees' annoyance or protest into a *bona fide* concern about their personal safety.

45. The evidence suggests that it was at Booth Avenue that the trouble began, and it was at Booth Avenue that the union and employer met in an effort to resolve the problem. Unfortunately, once the work stoppage had begun, it was difficult to bring it under control. Positions on both sides hardened, and efforts to seek a resolution were impeded by posturing, and a reluctance by either side to appear to be "backing down".

46. By early morning, union officials and members of the health and safety committees from all the yards had assembled at Booth Avenue. Earlier discussions had identified the alleged health and safety concerns, and the Ministry of Labour had been requested to send an inspector to investigate. Meanwhile, the parties debated the need for the vest and reviewed the problems which were said to be associated with its use. These were the by now familiar complaints that the vests were hot, uncomfortable, difficult to adjust, and "snagged on things". David Schaeffer in particular, complained that it was a "death vest" - although, of course, there is no evidence that any City employee in the Sanitation Department, or any other department where it was used, had actually been injured because of wearing the vest. There were almost 900 employees wearing vests in the operations section. There have been no injuries. Vests have been mandatory for North York sanitation employees since February 1982. There is no evidence before us of any injury or safety problem.

47. The meeting almost immediately bogged down in procedural bickering, centering on whether the City had conducted a duly constituted "safety committee meeting" and a proper "investigation" as required by section 23 of the *O.H.S.A.* That issue was not resolved by the arrival of the Ministry of Labour safety inspector, who took the position that he had no jurisdiction to intervene, until an investigation had been undertaken and completed. The inspector appears to have been of the view that such investigation must necessarily include a *demonstration* of the alleged

problems with the safety vest, carried out, in the field, under actual working conditions. Until that took place, he could do nothing.

48. This opinion was later the subject of much criticism by counsel, who viewed it as an abrogation of the inspector's responsibility; but in retrospect, it was not such an unreasonable response to the situation that he faced. The inspector, P. O'Reilly, had had regular contact with the City and the union, and had helped to resolve some of their earlier problems. He was the one who had received Kovacs's letter of November 23, 1981 (reproduced above), and despite many contacts with city workers between June 1981 and May 1982, there is no evidence that he or any other Ministry inspector had ever been advised of the alleged hazard associated with the vests. As far as he knew, the employees had worn the vests without incident, for eleven months, and no doubt he too must have wondered just what it was that warranted a simultaneous (allegedly uncoordinated) work refusal by two hundred and sixty employees at four separate locations. In the circumstances, it is not so unreasonable for him to expect that an investigation should include a process in which the employees would be invited to demonstrate precisely what it was that concerned them, or to respond to their complaints by saying, in effect, "show me". We are also satisfied that such demonstration could easily have been conducted without putting any employee at risk. After all, they had been wearing their vests for almost a year, and on the evidence, were prepared to continue to do so *so long as it was not combined with the new uniforms*. In a few hours a single crew, carrying out their regular duties, could have graphically illustrated the problems about which we heard days of evidence.

49. The inspector may not have been correct when he concluded that the investigation contemplated by section 23 necessarily required a "field test", or in his opinion that he could do nothing until an investigation of that kind had been completed. An inspection, examination, or enquiry can obviously take place without there being a test of the particular equipment or device under review. (Although in some circumstances a test may provide useful information, and tests are contemplated by the legislation - see for example, the terms of section 28 of the *Occupational Health And Safety Act*.) However, we do not find his position so unreasonable in the circumstances. A field test or demonstration was, in fact, a good way to illustrate or substantiate the alleged difficulties with this particular piece of equipment. But the inspector's professed inability to become involved did complicate matters.

50. Once the focus shifted from the underlying problem to the nature of the investigation required under section 23 of the O.H.S.A., the procedural wrangles multiplied, and the impasse deepened. The suggestion that there should be a simulation in the yard was rejected by the City and (according to the witnesses) the inspector. The City's suggestion that foremen put on the vest and perform the work for demonstration purposes, was also considered unacceptable because they were not members of the bargaining unit or among those raising the complaint. The union officials (or some of them) resisted the suggestion that a single crew put on their vests and go out to work, on the ground that this was precisely what they were refusing to do. David Schaeffer offered to go out to the yard, where the employees were milling around, to see if he could recruit any "volunteers", but, when he did so, he made it clear to them that he was not prepared to wear the vest himself, and that he had no authority to order anyone else to do so. Not surprisingly (and particularly in view of Schaeffer's earlier activities) no one volunteered. The City did not approach the employees directly because the City officials assumed that the union and health and safety representatives were accurately conveying the employees' views, and it would be futile to undertake any initiative which the union opposed. No one seems to have considered the possibility of monitoring the work of those employees at other yards who were not participating in the work refusal, or those who were protesting but were prepared to wear the old uniform with their vests, or the probationary employees who went out to work in accordance with the parties' agreement, or the night

crews who went out, as before, wearing their old uniforms. Nor do we understand why it was decided that a simulation in the yard or on the street with foremen would not have been appropriate. More importantly, we do not understand why employees would not have seized the opportunity to demonstrate their concerns to a Ministry of Labour inspector when, as we have already noted, that could have been done relatively easily and with no risk to themselves.

51. The discussions were also impeded by Kovacs's totally unfounded attack on O'Reilly's impartiality. That attack was made when O'Reilly expressed the opinion that the vest is more visible than the uniform alone - a fact which is really beyond dispute. As we have already observed, one might question the *need* for the vests, or their *utility*, or their *suitability*, however one cannot really question the fact that the fluorescent vests increase the employees' visibility. Yet Kovacs claimed that O'Reilly's statement of the obvious was evidence of bias, and demanded that O'Reilly withdraw and arrange for the dispatch of a new inspector. He did.

52. The new inspectors (two were sent) arrived late that afternoon and made no further progress in resolving the dispute. Like O'Reilly, they apparently took the view that there would have to be a field test, and until the employer conducted and assessed that demonstration, the Ministry could not be involved. In an effort to break the impasse, Willis proposed the establishment of a special union - management committee, including "outside" safety experts, which would meet on an expedited basis, and would render an informed opinion. This was precisely the kind of consideration which the union had long been demanding, but on May 19, when it was presented to the combined Health and Safety committees, it was rejected.

53. The City attributes that rejection to negative "body language" from Kovacs who had undertaken not to express an opinion. There is no need for us to make any finding in that regard. The fact remains that on May 19 the employees' representatives rejected a sensible solution which could have defused a volatile situation. It might also have avoided a work stoppage altogether if it had been proposed earlier.

54. By late that evening it was obvious that the discussions were going nowhere. The Ministry inspectors withdrew and, on the evidence, had no further involvement. They made no formal direction as to whether the vest was or was not "likely to endanger" the employees refusing to work. The union officials went home. The employer representatives discussed the employees' protest and eventually concluded that if the employees were not prepared to put on their vests and demonstrate the problems they were having with them, their safety concerns were not legitimate. The City officials decided that the work stoppage was a device to mobilize and exert pressure, not a *bona fide* expression of concern about the employees' personal safety.

55. The following morning, on the union's instructions, the employees reported for work and indicated that they were prepared to go out on their normal rounds so long as they did not have to wear the safety vest. The local City officials were instructed to advise these employees that there was work available for them. The employees were invited to continue to work, so long as they wore the prescribed safety vest. If they did not wear the vest, they would not be permitted to work, and would be treated as being on "suspension" pending further investigation. Since very few of the employees opted to go to work under those conditions, the stalemate continued until Tuesday, May 25, when the O.L.R.B. Chairman was able to arrange an interim settlement. The objecting employees were paid and assigned alternative work on May 19, but they were not assigned alternative work thereafter, nor were they paid. In the City's view, there was no alternative work for 260 employees. The only available work was their own work and that required a safety vest. The City took the position that if the employees were not prepared to work with the prescribed

safety equipment and were not prepared to participate in the investigation of its alleged defects, they could not expect to be paid.

56. As a result of the work stoppage and the enquiries subsequently undertaken, a Ministry inspector issued the following report dated June 23, 1982:

Following several days observing the activities of the City of Toronto workers in the Sanitation and Operations Sections I find that the use of vests is likely under certain circumstances to endanger the safety of the workers. Due to the nature of the work, the equipment and the variety of refuse and containers, the likelihood exists that the vest, or for that matter any loose fitting clothing can become entangled in the equipment or in the material or the containers being handled, thus endangering the worker.

It is recognized by both the employer and the workers that there is a definite need for workers to wear apparel that will make them clearly visible both day and night in all kinds of weather.

To meet both these needs it is essential that any apparel does not permit snagging or entanglement and still provides the necessary visibility. It appears that the vests may meet one of the needs but not the other.

I suggest that suitable alternatives should be investigated such as combining a retro- reflective material with working apparel (shirts, parkas, raincoats, etc...) or providing an adjustable belt or shoulder band fitting snugly but worn over outer garments.

• • •

57. The report is critical of the vest and questions its suitability, but makes no finding of any contravention of the O.H.S.A. or regulations, and makes no specific order that the vest should be discarded. Nor did the observation that the vest could be a hazard "under certain circumstances" provide the City with much guidance, bearing in mind that it was in use in other City departments, in some other municipalities and businesses, and was actually required for some categories of workers. From the City's point of view, the situation of the sanitation workers was not that unique; and while it is trite to say that loose fitting clothing may be hazardous around mechanical devices, it was not obvious to the City (or to us), that the kind of equipment associated with the work of the sanitation employees is so different from the machines or vehicles used in the Operations section, or in work situations where the vest is a legal requirement. Nor was it obvious to the City that the kind of work performed by its sanitation employees was so different from the work performed by other employees who wore their vests as a matter of law, or without incident or complaint.

58. The inspector's report was later supplemented by a further document dated December 2, 1982, and entitled "interim report". It contains a useful statement of the problem, a review of the literature, and a list of the devices currently available to enhance employee visibility. It adds little to the inspector's initial assessment, and makes no findings or recommendations about the suitability of the vest. It does not find or recommend that the vest should or should not be worn by the City's sanitation employees. As far as we know there was no final report. The alternative of "combining a retro-reflective material with working apparel" mentioned in the inspector's report had in fact already been in place for about a month pursuant to the Board-inspired compromise. It remains in place today, four and a half years later. The "visibility problem", if there ever was one, has, for all intents and purposes been solved.

59. We have included these two reports for the purpose of completeness, but must necessarily add this caveat: neither of them is particularly helpful in resolving the legal issues raised in this case. It is interesting to note the inspector's opinion, and it is difficult to disagree with his suggestion that if visibility is really a concern, there may be better ways of meeting that concern than the style of vest in use in 1981-82. However, the issue before us is not whether the vest might be

hazardous "in some circumstances". We must decidewhether on the morning of May 19, 1982, some two hundred and sixty employees at four locations who refused to work, virtually simultaneously, had "reason to believe" that using the vest they had worn for months was "*likely to endanger*" themselves or other workers in the actual circumstances they faced. We must decide whether their actions constitute an "unlawful strike". We must decide whether the City's decision to deny them the opportunity to work without their vests is an unlawful "lock-out" or alternatively an illegal reprisal for the exercise of rights protected by the *O.H.S.A.*

III

60. We shall deal with each of these questions, in turn, then move on to a consideration of the related complaint by several employees in the Operations Section of the Department of Public Works, who contend that they, too, were dealt with contrary to the *O.H.S.A.* First, it may be helpful, to set out the relevant statutory provisions. They are as follows:

"Labour Relations Act

1.(1)(o)

"strike" includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output."

1.(1)(k)

"lock-out" includes the closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his employees, with a view to compel or induce his employees, or to aid another employer to compel or induce his employees, to refrain from exercising any rights or privileges under this Act or to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, an employers' organization, the trade union, or the employees.

OCCUPATIONAL HEALTH AND SAFETY ACT

2.-(1) This Act binds the Crown and applies to an employee in the service of the Crown or an agency, board, commission or corporation that exercises any function assigned or delegated to it by the Crown.

(2) Notwithstanding anything in any general or special Act, the provisions of this Act and the regulations prevail.

23.-(3) A worker may refuse to work or do particular work where he has reason to believe that,

- (a) any equipment, machine, device or thing he is to use or operate is likely to endanger himself or another worker;
- (b) the physical condition of the work place or the part thereof in which he works or is to work is likely to endanger himself; or
- (c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention is likely to endanger himself or another worker.

(4) Upon refusing to work or do particular work, the worker shall promptly report the circumstances of his refusal to his employer or supervisor who shall forthwith investigate the report in the presence of the worker and, if there is such, in the presence of one of,

- (a) a committee member who represents workers, if any;
- (b) a health and safety representative, if any; or
- (c) a worker who because of his knowledge, experience and training is selected by a trade union that represents the worker, or if there is no trade union, is selected by the workers to represent them,

who shall be made available and who shall attend without delay.

(5) Until the investigation is completed, the worker shall remain in a safe place near his work station.

(6) Where, following the investigation or any steps taken to deal with the circumstances that caused the worker to refuse to work or do particular work, the worker has reasonable grounds to believe that,

- (a) the equipment, machine, device or thing that was the cause of his refusal to work or do particular work continues to be likely to endanger himself or another worker;
- (b) the physical condition of the work place or the part thereof in which he works continues to be likely to endanger himself; or
- (c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention continues to be likely to endanger himself or another worker,

the worker may refuse to work or do the particular work and the employer or the worker or a person on behalf of the employer or worker shall cause an inspector to be notified thereof.

(7) An inspector shall investigate the refusal to work in the presence of the employer or a person representing the employer, the worker, and if there is such, the person mentioned in clause (4)(a), (b) or (c).

(8) The inspector shall, following the investigation referred to in subsection (7), decide whether the machine, device, thing or the work place or part thereof is likely to endanger the worker or another person.

(9) The inspector shall give his decision, in writing, as soon as is practicable, to the employer, the worker, and, if there is such, the person mentioned in clause (4)(a), (b) or (c).

(10) Pending the investigation and decision of the inspector, the worker shall remain at a safe place near his work station during his normal working hours unless the employer, subject to the provisions of a collective agreement, if any,

- (a) assigns the worker reasonable alternative work during such hours; or
- (b) subject to section 24, where an assignment of reasonable alternative work is not practicable, gives other directions to the worker.

(11) Pending the investigation and decision of the inspector, no worker shall be assigned to use or operate the equipment, machine, device or thing or to work in the work place or the part thereof which is being investigated unless the worker to be so assigned has been advised of the refusal by another worker and the reason therefor.

(1.) The time spent by a person mentioned in clause (4)(a), (b) or (c) in carrying out his duties under subsections (4) and (7), shall be deemed to be work time for which the person shall be paid by his employer at his regular or premium rate as may be proper.

24.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply, with all necessary modifications, to the complaint.

(3) The Ontario Labour Relations Board may inquire into any complaint filed under subsection (2), and section 89 of the *Labour Relations Act*, except subsection (5), applies with all necessary modifications, as if such section, except subsection (5), is enacted in and forms part of this Act.

(4) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), sections 102, 103, 106, 108 and 109 of the *Labour Relations Act* apply, with all necessary modifications.

(5) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.

(6) The Ontario Labour Relations Board shall exercise jurisdiction under this section on a complaint by a Crown employee that the Crown has contravened subsection (1).

(7) Where on an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.

(8) Notwithstanding subsection (2), a person who is subject to a rule or code of discipline under the *Police Act* shall have his complaint in relation to an alleged contravention of subsection (1) dealt with under that Act.

IV

61. We have read, with interest the various authorities referred to us by counsel and we have carefully considered the argument advanced by Mr. Goldblatt that, under section 23(1) of the *O.H.S.A.*, at the point of the initial work refusal, a worker's "burden of justification" is lower than it is under section 23(6) after the intervention of a health and safety inspector. We are inclined to agree with that proposition. That is the natural implication of the differences in statutory language ("reason to believe" versus "reasonable grounds to believe"), and, as a purely practical matter, the validity of an employee's work refusal is more likely to be substantiated if the inspector agrees with him than if he does not. That is why the Union makes so much of the fact that, eventually, a Ministry inspector did form the opinion that "in some circumstances" the use of the vest might pose a safety hazard. Moreover, even the phrase "burden of justification" must be

used with some care because it is clear that, under section 24 of the *O.H.S.A.*, the employer has the legal burden of justifying any action taken against an employee refusing to work.

62. We also agree that the Board should not put an unduly rigid construction on the terms of section 23(1), lest employees be discouraged from raising safety issues at the work place. That would be inconsistent with the scheme of the Act. Section 23 is designed to promote and protect employee prudence, while at the same time, providing a mechanism for resolving legitimate concerns through a process of discussion with the employer, and, if necessary, the assistance of a "neutral" official of the Ministry of Labour. It is both proper and desirable that employees should be able to voice their safety concerns without fear of penalty or reprisals. However, the problem in this case is not the evidentiary threshold that employees must meet under section 23 (1) as opposed to section 23(6); but rather whether a concern about their personal safety was the "real reason" that employees were refusing to work on May 19.

63. Counsel for the City points to what he describes as the "collective" or "concerted" nature of the employees' work refusals, and argues that this points inevitably, to the conclusion that they were engaging in an unlawful strike. We would not take the proposition quite that far. We agree that the apparently concerted nature of the employees' conduct may colour the Board's view and lead to inferences about the employees' real motive, however, so long as employees work together in groups and may be confronted with situations that they *individually and collectively* may regard as unsafe, we cannot conclude that a refusal to work was unjustified simply because a number of employees were involved. That proposition was clearly established in *Inco Metals Co.* [1980] O.L.R.B. Reports July 981, where the Board majority had this to say:

55. It is understandable for a company to be concerned that a group of employees, in the guise of invoking safety legislation, might refuse to work for reasons in fact unrelated to their own safety. In irresponsible hands any right can be abused. Moreover, safety issues, like the one in the instant case, can involve technical factors better understood by management. It is therefore not unnatural for a company to sometimes wonder whether a refusal to work by a group of employees is in fact a gesture of strength that is more impetus than cautious and to suspect that it is substantially inspired by other concerns.

56. Another natural concern for any company in the face of the right of employees to refuse unsafe work is the element of surprise. One of the things that a company expects in any collective bargaining setting is a freedom from work stoppages during the life of a collective agreement. The cost to the company both in terms of lost production and expenses incurred to remedy an unsafe condition may come without warning and require an unwelcome departure from established financial planning and a company's own schedule for capital and safety improvements. Moreover, any right of groups of employees to refuse to work because of health and safety concerns over such factors as the location or design of a plant, the choice or design of tools and equipment, the kind of materials used and the overall method of production tends to make negotiable matters previously within the exclusive discretion of management. Given all of these factors it is not unnatural for employers generally to have reservations about the motives for any concerted action in the name of safety (See, generally, Ison, *Occupational Health and Wildcat Strikes*, *supra*).

57. As valid as those general concerns may be, this Board must not construe the statutory right to refuse unsafe work so narrowly as to unduly discourage its legitimate use. In fact valid employee complaints can and do arise in a group setting. When employees do share a concern a group response may be natural. And, as the instant case illustrates, different groups, like different individuals, may react differently to the same circumstances. By the very nature of the employment relationship, it often takes courage to confront an employer. It would, therefore, be unduly restrictive and unrealistic to construe the statutory right to refuse unsafe work as being unavailable to employees who share a concern and act with a common purpose.

58. The rights conferred by the Act are not unlimited. Nothing for example, permits employees who are not themselves involved in a perceived safety hazard the right to down their tools out of

sympathy for another employee whom they think is confronted with unsafe work. Before any employee can invoke the right to refuse work he must have reasonable grounds to believe that he himself is in jeopardy or that he will place another employee in jeopardy if he proceeds to work. The question must always be whether the employees refusing to work, whether individually or as a group, each have sufficiently close relationship to a perceived hazard that they are themselves in peril or that they will put another employee in peril by performing their work. Moreover, the refusal to work protected by the statute is not a general withholding of services. An employee who protests that working conditions on a particular job are unsafe can't refuse to perform alternative work that isn't unsafe.

59. The requirement that an employee have "reasonable cause to believe" that there is danger imposes an objective standard by which to test the employee's action. The Act does not, by the use of the words "reasonable cause", legislate different standards of protection for the squeamish and the intrepid. Different employees within the same work place may have different views of what constitutes an acceptable risk. Likewise, strangers to a particular trade or industry might view with alarm situations that are not seen as hazardous by the people who work in that field on an every day basis. On a complaint such as this, therefore, in considering whether an employee had reasonable cause to refuse to work in a given situation, this Board must ask itself whether the average employee at the work place, having regard to his general training and experience, would, exercising normal and honest judgement, have reason to believe that the circumstances presented an unacceptable degree of hazard to himself or to another employee.

60. The ability of an employee to invoke the right to refuse work does not depend on whether there is in fact any danger. The question is whether at the time an employee refuses to perform his work he has reasonable cause to believe that it is unsafe to do so. The fact that it may later be shown that there was no real danger at the time an employee refused to work doesn't mean that the employee was wrong in exercising his right under the Act. The events must be assessed in the light of knowledge available at the time that the employee refused to work.

(We should note that *Inco* was decided under the predecessor to the current *O.H.S.A.*, which put a slightly higher obligation on the employee at the "entry level").

64. We agree with those observations, but would add one more: while the Board must be scrupulous in ensuring that employees' rights under the *Occupational Health And Safety Act* are protected, we must also ensure that those rights are not abused, or raised to camouflage illegal strikes. That was a concern frequently raised in the employer community prior to the passage of the *Occupational Health And Safety Act*, and if such abuse became a pattern, it would undermine the legitimacy of the whole regulatory scheme. This is not to say the employees, individually or collectively, must await an accident before protesting about safety problems. Clearly, they are entitled to act if they have reason to believe such problems exist. But, by the same token, the *O.H.S.A.* should not be treated as a convenient pretext, to be invoked in defence of employee protests which do not really involve their personal safety. Collective action in conjunction with other evidence of the employees' motivation may well point to the conclusion that their conduct really does constitute a "strike" rather than a *bona fide* refusal to work because of safety concerns. That is our conclusion in the instant case.

65. The employees had worn their vests for months without incident and, in most cases, without complaint. Their Union, however, had always regarded the vest as an *interim* arrangement which would be replaced by a more brightly coloured uniform. The Union actively fostered that view, despite repeated employer assertions to the contrary, and led the employees to believe that once the new uniforms were issued, the vests would be removed. A work stoppage was predicted a week before it happened. As late as May 18, the day before the uniforms were issued, David Schaeffer, chief steward at the Booth yard where the trouble began, was advising employees that they could refuse to wear their vests claiming the protection of "Bill 70" - something which he says he had been planning to do for several days. The following day he encouraged precisely that response. Yet, at the same time, many employees indicated that they were prepared to work wear-

ing their vests and the old uniform and some crews went out on this basis. The probationary employees went out to work with the agreement and encouragement of their trade union which, apparently was less concerned about their safety than the possibility that if the work refusal was subsequently found to be unjustified, probationary employees might have only a limited right to complain under the terms of the collective agreement. Willis' belated but sensible compromise proposal was rejected, and when offered the opportunity to participate in the investigation and actually demonstrate what it was that caused them concern, the employees declined. One would have expected that employees with a legitimate safety concern would have welcomed the opportunity to air their complaints which had so long been neglected or denied by the City.

66. We find that the sanitation workers were not engaging in activity protected by sections 23 or 24 of the *O.H.S.A.* They were engaging in a strike, designed to protest the employer's failure to remove the vests (as their Union had told them would happen) and intended to put pressure on the City to withdraw a piece of apparel which they no longer considered necessary. We so declare.

67. However, having found that the employees engaged in an unlawful strike, we do not think that it is necessary to make specific declarations about whether, or the extent to which certain Union officials (or some of them) may have counseled, procured, encouraged or supported that unlawful strike, or to make any other remedial direction. Section 92 gives the Board a discretion in this regard, and, in our opinion, no further declarations are necessary.

68. The strike occurred four and a half years ago. There is no reasonable likelihood of any repetition. To all intents and purposes, the underlying issue has long since been resolved. The "interim arrangement" worked out with the Board's assistance on May 25, 1982, continues to endure. There is no reason to believe that any residual or remaining safety concerns cannot be resolved through the process of joint discussion and investigation triggered by the strike itself - particularly since the parties have engaged the active assistance of the Health and Safety Branch of the Ministry of Labour. It is only unfortunate that the parties could not have composed their differences without the emotionalism, stubbornness, posturing, and ultimate resort to illegal sanctions which characterized their treatment of this question in 1981-82. It is particularly troubling when it is apparent that, *in general* (and despite some of our observations *supra*) the parties have a long-standing and reasonably sensible collective bargaining relationship. Unfortunately in this particular department, and on this particular issue, the local management did much to contribute to the City's subsequent problems. Had the local officials been less insistent on their "management rights", less inclined, on the basis of expediency, to bypass established channels of communication, and more attentive to their employees' complaints, it is unlikely that there would have been any serious difficulties. We also expect that the expenditure of public and private money in prosecuting these proceedings, will, in itself, have a therapeutic effect, and that the bureaucratic paralysis that characterized the health and safety committees in the early years of their existence is unlikely to be true today. Finally, the striking employees have already been "penalized" in the sense that they were not paid for the time not worked. That is not an inappropriate result, nor is it an inappropriate message for employees tempted to engage in an unlawful work stoppage: "if you do, you won't get paid." That is but the corollary of the proposition advanced earlier and supported in *Inco*, that employees or groups of employees with legitimate safety concerns are protected under section 23 and 24 of the *Occupational Health And Safety Act*. (It is unnecessary to determine whether they would have been entitled to payment if their mass work refusal had been lawful.)

69. Was the City's refusal to permit the protesting employees to work without their vests or their purported "suspension", an unlawful "lock-out"? We do not think so. That action was not taken *with a view to* compel or induce those employees to refrain from exercising any rights or privileges under the *Labour Relations Act*. Nor, in our view, was the employer's position an attempt to

exact concessions or force agreement on particular terms and conditions of employment or employee rights or privileges in the sense contemplated by section 1(1)(k) of the *Labour Relations Act*. The employer was merely exercising the right which it clearly had under the management rights clause of a collective agreement and section 14 of the *Health and Safety Act* to prescribe the style of the employees' uniforms or equipment and to insist that those requirements were a condition of employment. The City was informing its employees that they were required to wear the prescribed vest (just as they were required to wear the prescribed uniform) and that, if they refused to do so, they would not be permitted to work at all - there being no alternative work which, in the employer's view could be done without the prescribed apparel. Even if this situation fits within a possible linguistic interpretation of section 1(1)(k) we do not think that it falls within the ambit of the conduct which the Legislature intended to proscribe. To send the "refusers" home was not an inappropriate or disproportionate response-particularly bearing in mind that the employees were engaging in a strike rather than an activity protected by the *O.H.S.A.*, and, at the time, the employer honestly (if perhaps mistakenly) believed that the vests were the most appropriate way to ensure the desired degree of employee visibility. Unless it could be established that the employees, *at the time*, had a *bona fide* safety concern, (which, for the foregoing reasons, we reject), they had no right to disobey the employer's instructions and cannot now claim payment for time not worked.

VI

70. The Operations Complaint

On this branch of the proceeding, several employees in the Operations Section of the Public Works Department, contend that they too were penalized when, like their fellow employees in the Sanitation Section, they refused to wear their safety vests. Having set out, at some length, our opinion about the work stoppage in the Sanitation Section we think that the "operations complaint" can be dealt with relatively briefly, even though we heard quite a bit of evidence about it.

71. Joe Mele testified that once the sanitation employees began refusing to work, their fellow employees took it for granted that they should be "coming out" to support them. Mele tried to explain that there was no need to do so because, in this instance, the sanitation employees were expressing a safety concern. John McLennan, Chief Steward at the King Street yard said the same thing. There was no need for union solidarity. However that message was lost on several members of the Operations Group, one of whom told James Frew a supervisor that "he had to support his Union". That was the reason that he was refusing to go to work wearing his safety vest. Claire Carter, another supervisor, confirms that the initial reason raised by these "refusers" was that they were "backing their Union". Carter testified that sometime before the operations problems arose (he wasn't sure which day) he saw Schaeffer addressing a group of operations employees about the vests. He did not hear much of the conversation but did hear Schaeffer's last comment that the employees had to "stick together".

72. The vast majority of the Operations employees continued to wear their prescribed safety vests as they had done in the past and (discretion being the better part of valour) Frew decided that the tiny minority of "refusers" should be assigned alternative work. That work involved moving some construction material and cleaning up the debris in the "Unwin dump". That is a task which must be undertaken each spring when the snow melts. The Unwin dump is one of the places where City employees deposit snow and ice removed from the City's streets during the winter. Every spring it is necessary to clean up the residue.

73. We heard much evidence and much complaining about the alleged adverse conditions in which these "refusers" were required to work and the alleged "lack of amenities" at the Unwin

Avenue dump site. There was (initially) no trailer or toilet immediately at hand. It was a dirty job. It was raining, and one employee did not have the appropriate rain gear (having lost it apparently). The ground was wet. There was a foreman stationed nearby who, it was said, was monitoring them in a menacing manner (but who, on the evidence, seems to have spent most of his time in his truck reading the newspaper and occasionally ferrying the employees back and forth for coffee or lunch breaks). One City witness observed a refuser standing conspicuously in a puddle entirely surrounded by dry ground. Perhaps he was trying to make a point. Later, the refusers were assigned other alternative work in closed laneways where there was no vehicular traffic and no vest was necessary.

74. We find that these “refusers” were not engaging in activities protected by the *O.H.S.A.*. Indeed, they had even less reason to fear for their safety than the sanitation employees because it is not seriously disputed (before us at least) that the safety vest was the accepted norm for workers in the Operations Section. The refusers were engaging in a form of sympathetic “strike”, “protest”, or “job action” and the City responded by assigning them alternative duties. We do not think that the City’s actions constitute an unlawful lockout, an illegal penalty or a violation of section 24 of the *O.H.S.A.*

75. For the foregoing reasons, the Union’s complaints respecting the sanitation employees made under section 24 of the *O.H.S.A.* and section 93 of the *Labour Relations Act* are hereby dismissed. The employer’s complaint under section 92 of the *Labour Relations Act* is allowed but, for reasons given, it is unnecessary to make any formal order or remedial direction other than a declaration of an unlawful strike. The complaint of the Operations’ employees under section 24 of the *O.H.S.A.* is dismissed.

3066-85-R Ontario Nurses’ Association, Applicant, v. Toronto General Hospital, Respondent

Bargaining Unit - Certification - Whether “30/30 rule” should be applied to casual relief nurses for purposes of the count - Test used in York for occasional teachers not adopted

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members B. L. Armstrong and I. Stamp.

DECISION OF THE BOARD; December 15, 1986

I

1. This is an application for certification. When the matter initially came on for hearing the parties spent much of the day discussing outstanding issues with the assistance of a labour relations officer, and consequently the case never came back for a formal hearing before the Board. The parties agreed to make written submissions on the remaining issue in dispute between them.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

3. For ease of reference, the applicant Ontario Nurses’ Association will be referred to

either as "ONA" or "the union" and the respondent will be referred to simply as "the employer" or "the Hospital".

4. The parties have agreed upon the description of the unit of employees appropriate for collective bargaining. That bargaining unit is framed as follows:

All registered and graduate nurses of the respondent in the Municipality of Metropolitan Toronto, regularly employed in a nursing capacity for not more than twenty-four (24) hours per week, save and except head nurses, head nurses/occupational health department, persons above the rank of head nurse, head nurse/occupational health department, staff development personnel, registered nursing assistants, non-registered nursing assistants, operating room technicians, and employees in bargaining units for which any trade union held bargaining rights as of March 18, 1986.

We should note that this particular bargaining unit (with exceptions not here material) could be described as the "standard part-time nurses' unit" - by which we mean that, over the years, parties have routinely agreed upon a unit framed in this way, and on applications for certification the Board has routinely found such units to be appropriate. They have therefore become an established component in the initial bargaining structure for public hospitals. This part-time unit mirrors and complements the standard description of a full-time nurses' unit.

5. The problem in this case is not the *description* of the bargaining unit. That is agreed upon and consistent with the Board's past decisions in the hospital industry. The question raised by the Hospital in this case concerns the *composition* of the bargaining unit on the date of the application and, in particular, how to treat a number of "casual relief nurses" who work on an irregular basis to fill in gaps in the Hospital's roster. The vast majority of these employees were not actually at work on the application date and, it would appear, that they benefit in varying degrees by the casual employment opportunities offered by the Hospital. According to the Hospital's submission, there is no guarantee that preferred shifts will be offered nor any guarantee that the Hospital will not cancel shifts scheduled where staffing changes are required due to patient work load (etc.). There is no obligation either way. The Hospital asserts that "the majority of nurses do not seek inclusion on a master schedule and, therefore, either wait for a call from the staffing office or call in and indicate availability in a given week".

6. The Hospital contends that these nurses working on a part-time casual/call-in basis should be treated as part of the part-time bargaining unit, so long as they have indicated their *willingness* to work on a part-time basis and have proven their *availability* to work, by actually working within the twelve-month period immediately preceding the application. In the Hospital's submission, that is the group within which the union must seek majority support if it is to establish its right to certification. In support of that proposition the Hospital relies upon the decision of the Board in *Board of Education for the City of York*, [1985] OLRB Rep. May 767. That case involved "supply teachers" who fill in on a part-time, sporadic, or "as-needed" basis when regular classroom teachers are not available. The Hospital contends that the approach in the *York* case is applicable here, because the nurses "on call" have a similar casual employment relationship with the respondent hospital.

7. We shall have more to say about that later. First we should say something about the so-called "30/30 rule" which ONA urges us to apply and the Hospital argues should not be applied in this case. That was the focus of their dispute and their written submissions.

II

8. Section 7 of the Act requires the Board to “ascertain the number of employees *in the bargaining unit at the time the application is made*”; however, there are no legislated criteria to guide the Board in this task. The determination as to whether a person is or is not to be treated as an employee in the bargaining unit on the application date is left to the Board to decide, and of course, there is really no difficulty in respect of those individuals who are both employed and *actually working* on the application date. The problem arises in the case of persons who might have some claim to employment status for certification or collective bargaining purposes, but who were not actively at work on the application date and may not even be scheduled to return to work for some time thereafter. Persons on sick leave, maternity leave, long-term disability, Workers’ Compensation or layoff may fall into this category. So could persons employed on an irregular or contingent basis by a firm whose employee needs fluctuate from day to day. In the case of a bargaining unit of part-time employees there is the related question of how one determines whether someone should be classified as “part-time” - bearing in mind that an individual’s work hours may fluctuate depending upon the season, the market, or the employer’s particular needs.

9. To cope with these practical problems, the Board has, over the years, developed a number of “rules” or “standardized approaches” concerning the way in which it should go about its task of ascertaining the number of employees in the bargaining unit on the application date. For example, to distinguish between full-time and part-time employees, the Board typically looks to the individual’s work record in the seven weeks immediately preceding the application date. If during four of those weeks, s/he worked less than twenty-four hours per week, s/he will be considered part of the part-time bargaining unit even if in the week of the application s/he may have worked more than twenty-four hours (see: *Trenton Memorial Hospital*, [1980] OLRB Rep. Jan. 116). Similarly, in the construction industry where employment is typically transitory, so that workers are “here today and gone tomorrow”, the Board has determined that the employee complement, for certification purposes, should consist only of those individuals actually at work on the application date - fully realizing that this number may well be different the day before, or the day after. For example, if the application date is a rainy day, the union may even find that its members are not at work so that the application must be dismissed. This particular “rule of thumb” has been accepted and applied by unions and employers in the construction industry for thirty years - and for very practical reasons: anything else would lead to costly and time-consuming litigation on every certification application, causing delay which would severely prejudice the establishment of bargaining rights purportedly guaranteed by the statute. (See the discussion in *Smiths Construction Company*, [1984] OLRB Rep. March 521.)

10. In most non-construction situations, the Board has been disposed to apply what has now come to be known, colloquially, as its “30/30-day rule” in order to decide how many persons should be considered “employees in the bargaining unit at the time the application is made”. Persons not actually at work on the application date will ordinarily be included in a bargaining unit for the purposes of the count if they meet the “test” which was summarized in the *York* decision as follows:

52. In order to meet the requirements of the 30/30-day rule, an employee not actually at work on the application date must *have* worked at some time in the 30-day period immediately preceding the application *and* work, or be expected to return to work at some time in the 30-day period immediately after the application date. Of course, like all rules, this one could be considered somewhat arbitrary; however, the fact is that it has withstood the test of time (at least 30 years), and without it or some similar arbitrary rule, it would be impossible to expeditiously process the hundreds of certification applications which come before the Board every year. The 30/30 rule has been regularly and routinely applied in a variety of industrial contexts to the obvious advantage of parties who must make or respond to certification applications. No rule is writ-

ten in stone; but there is a substantial onus upon any party seeking to persuade the Board to depart from this well-established, useful, and well-accepted practice. That is what the respondent and OPSEU urge the Board to do in the instant case.

In this regard, the Board was merely restating the views expressed earlier in *Board of Education for the City of Toronto*, [1983] OLRB Rep. Feb. 273, where the Board had this to say:

24. Thus, to be included as an employee in the bargaining unit for the purposes of the count, a person who was not at work on the date of the application must generally have been at work at some time during the one month period prior to the application date and have returned to work (or have been expected to return to work) within the one month period following the application date. (See also *Brewers Nursing Home*, [1981] OLRB Rep. July 852; *Irwin Toy Limited*, [1970] OLRB Rep. Dec. 912; *Keynorth Limited*, [1970] OLRB Rep. July 477; *Mobile Cartage and Distributors Ltd.*, [1968] OLRB Rep. Nov. 814; and *West Elgin District High School Board*, [1968] OLRB Rep. July 379.) This longstanding practice of the Board enables the parties to ascertain in advance of the hearing the persons who will be included for purposes of the count (see *Sydenham District Hospital*, [1967] OLRB Rep. May 135). A further reason for the existence of the practice is that it tends to exclude from the count persons who have not been at work during the trade union's organizing campaign and have not had an opportunity to express their support for or opposition to the trade union (see *Bertrand & Frere Construction Co. Limited*, [1965] OLRB Rep. July 292). See also *Sherman Sand and Gravel Ltd.*, [1978] OLRB Rep. May 460....

...

27. Board practices such as the seven week rule (described in *Westgate Nursing Home Inc.*, [1981] OLRB Rep. April 503), and the thirty day rule described above, are guidelines, not hard and fast rules. However, since such guidelines are known, accepted and relied on by unions and employers alike, there is a substantial onus on any part requesting the Board to depart from such practices (see *Trenton Memorial Hospital*, [1980] OLRB Rep. Jan. 116, and *Sherman Sand and Gravel Ltd.*, *supra*). In the circumstances of the instant case, the Board does not find it appropriate to depart from its normal practice of applying the thirty day rule....

11. We should also note that the *Sydenham District Hospital* case, mentioned above, involved a part-time bargaining unit in a hospital setting where the Board affirmed the 30/30 rule and applied it to part-time employees, noting that "this practice has been one of longstanding with the Board and was determined in order that the parties would be able to ascertain, in advance of a hearing which were [sic] dealt with by the Board in the Application". Indeed, apart from the *York* case or other cases involving occasional teachers, there are very few situations in which the Board has not followed its established practice. Counsel for the Hospital, in his submissions, does not point to a *single instance*, where the Board has applied his proposed "test" for the composition of a hospital or industrial bargaining unit. In contrast, the union points out that, for many years, in many sectors, organizing has been undertaken and certification applications processed in accordance with the Board's established practice. Hospitals have never been regarded as an exception. On the contrary, the Board has routinely applied the 30/30 rule.

12. In setting out what the parties and the Board refer to as the "30/30 rule", we have not ignored the fact that this guideline is a procedural construct, arising from the Board's own experience, and adopted in certification proceedings to facilitate the process and give some predictability to resolving the list of employees in full-time and part-time bargaining units. By adopting this practice the Board has sought to make it easier for the parties appearing before it to come to their own agreement on the status of employees, and for employees and their unions to gear their organizing campaigns accordingly. These guidelines cannot, of course, be applied in an arbitrary way without regard to the case before the Board; and, it is recognized that one could plausibly draw the line in other ways, or try to fashion, in each case, individualized criteria which would most perfectly meet the particular circumstances under review. Every case could be viewed as a novel situation with the

Board reviewing the circumstances of each employee, one by one, to determine whether s/he had sufficient connection to the work place, for *collective bargaining purposes*, to warrant inclusion in the bargaining unit. That approach might even generate, in particular cases, a “more perfectly representative” grouping of workers - at a cost, perhaps, of undermining the certification process itself, which would quickly become bogged down in litigation over the precise composition of the bargaining unit. With certification applications now numbering over a thousand each year, there is an obvious need for procedural certainty and predictability, in order to serve the expectations of the labour relations community and process certification applications in accordance with the spirit of the Act which is expressed in its Preamble:

WHEREAS it is in the public interest of the Province of Ontario to further harmonious relations between the employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees.

13. That is why the Board has always held that there is a substantial onus on any party requesting that the Board depart from established approaches which are known, accepted, and relied upon by unions and employers alike. Over the years, the Board has come to the view that the tug towards adjudicative perfection in particular cases must give way to administrative reality and the need for guidelines which will lead, in most cases, to established and predictable results without protracted litigation. The “30/30 rule” is such a guideline which is rooted in the Board’s experience and (apart from the present case) has gained substantial acceptability in the labour relations community - even in situations involving public hospitals. It is no accident that (except for occasional teachers) the respondent’s submissions do not identify a single case in which, for the purposes of the count, the Board has departed from this approach whether in a hospital setting or otherwise. The fact that casual employees may have certain rights under negotiated collective agreements or the Board may take a more expansive approach in respect of persons not scheduled to be at work on the date a representation vote is ordered, does not alter that reality. Even *Hurdman Brothers Limited*, [1983] OLRB Rep. Feb. 238, referred to by the employer, does not deal with the position of casual part-timers.

14. The *York* case dealt with “occasional teachers” and declined to apply the “30/30 rule” in that context - thereby departing from the decision of an earlier panel of the Board in somewhat similar circumstances (see *Board of Education for the City of Toronto*, [1983] OLRB Rep. Feb. 273). In *York*, the Board decided that for the purposes of determining the count in certification applications involving “occasional teachers”, the Board would treat as “employees” all occasional teachers who were on the employer’s “call-in list” and had worked for at least one day in the year preceding the application - even though it was abundantly clear that many of those individuals probably would not be considered as “employees” at common law. They were, at best, prospective or potential employees and would not *actually* be employees in any accepted legal sense except when they were actually working. The fact that the Board did depart from its established practice in *York* despite an earlier precedent on point, underlines the fact that the 30/30 rule is not written in stone.

15. However, the situation in *York* is clearly distinguishable from the one currently before us in this case. In the first place, we should note that none of the parties in *York* suggested the application of the 30/30 rule. They all proposed (different) variations. They all rejected common-law tests and admitted that the Board should take into account for *certification purposes* individuals who would probably not be employees at common law. They urged the Board to adopt a test which makes labour relations sense in an anomalous situation. Whether the Board has done so remains a matter of debate.

16. In *York* there was not just a fluctuating and often unpredictable complement of casual employees. There was no "core group" of regular employees either (see paragraph 57 of *York*), and the "occasional teachers" could not even readily associate for collective bargaining purposes with their professional peers whom they replaced because these permanent "contract" teachers are regulated by a different collective bargaining statute - "Bill 100": *The School Boards and Teachers Collective Bargaining Act (1975)*. Because "occasional teachers" are excluded from Bill 100, they fall, by default, under the *Labour Relations Act*. Thus, in *York* the Board was called upon to consider a bargaining unit which would consist *solely* of casual workers whose employment pattern would necessarily be erratic. Under ordinary circumstances the Board would never consider or accept a bargaining unit of that kind. It would not be appropriate. It was only in this special context that the Board was moved (with some reluctance given the earlier *City of Toronto* decision) to depart from its usual approach based upon the 30/30 rule. The Board said:

We could adhere to the 30/30 rule, adopt one of the propositions urged upon us by the parties, or apply some other approach which accommodates the competing interests at issue. Any approach will necessarily be arbitrary and will entail some difficulties. However, even in this anomalous situation, we are persuaded that there must be a bright line test, or the rights of occasional teachers in this and other applications will be lost in a sea of litigation. The parties recognize the need for a uniform and standard approach. That is why they agree that this should be a test case. They disagree as to what the rule should be...There is something to be said for the proposition that, at some point during the school year, it may be possible to identify the core group of occasional teachers who will have a proven attachment to a particular school or board of education. But we are not disposed to engage in an arithmetic or statistical exercise. The situation is complicated enough already without considering, on a case-by-case basis, the precise point when the utilization of particular occasionals will be sufficiently frequent to generate a coherent and identifiable group.

Thus even in this anomalous situation, the Board recognized the need for a "bright line test" to give certainty and stability to the administration process; moreover, the Board was careful to underline the fact that the situation in *York* was exceptional:

Needless to say, this special approach has been adopted to meet the unusual circumstances of occasional teachers, and should not be construed as a signal that the Board will depart from its established practice in other contexts.

17. No approach adopted by the Board could ever achieve perfect decimal point democracy, or command the unqualified acceptance of partisans in particular cases; for the fact is, that the broader the bargaining unit constituency, the more difficult it will be to organize (particularly where the union has no right to know in advance who the employees are, and no protected right to organize on the employer's premises). Any proposition which expands the scope of the bargaining unit or renders its composition uncertain, will raise a barrier to the employees' right of self organization. On the other hand, the more narrow and certain the employee constituency, the easier it will be for them to identify their collective interests and establish a majority for collective bargaining purposes. Moreover, from an administrative point of view, if the composition of the bargaining unit is difficult to define in advance, or is open to debate on a case-by-case basis, with attendant delays, the right of self-organization may be undermined from a practical point of view by employee turnover or because the employees' initial appetite for collective bargaining has been frustrated by the delays in the certification process itself. Employees typically opt for collective bargaining because they believe it will improve their lot. If it takes too long to establish even their right to *begin* the bargaining process, their support may wane. As Laskin J.A. observed in *Nick Masney Hotels Ltd.* 70 CLLC ¶14,020:

"The Ontario Labour Relations Board deals in certification matters with fluid situations which cannot be judged by the more leisurely standards that operate in the prosecution of a claim for damages for a tort or a breach of contract where the situation is fairly well frozen when the tort

or breach of contract occurred. Expedition is important to a union, to employees and to an employer since the certification is merely the first step in an often laborious collective bargaining process”.

Estey C.J.O. later put it this way:

“the overriding principle invariably applied is that labour relations delayed, are labour relations defeated and denied”.

18. It is these considerations which have prompted the Board to adhere, fairly rigidly, to its 30/30 rule as a means to accommodate the parties’ competing tactical interests, recognize the potential interests of individuals not actually at work on the day the application was made, avoid litigation or gerrymandering and inject some certainty and predictability into the certification process. That “rule” has been routinely applied for decades, has gained general acceptability in the labour relations community, enables parties (and their counsel) to deal with certification applications in an orderly and expeditious way and, in our view, generally promotes the underlying objectives of the statute. Even in the hospital industry, where there has been extensive organizing over the last 20 years, we are not aware of any case in which the 30/30 rule has been abandoned or any practical problem which has been raised or has arisen as a result of its application. The fact is: it seems to work; and were it not for the *York* decision (which for the reasons set out above is distinguishable), counsel for the employer would be able to find little authority for treating this Hospital differently from other hospitals, nursing homes, or other employers which engage casual employees, and where the 30/30 rule has nevertheless been applied. Despite the thorough and thoughtful arguments of counsel for the employer, we are satisfied that we should apply it here. We are not persuaded that the circumstances here warrant any departure from the Board’s established approach.

19. Having regard to the foregoing, the Board is satisfied on the basis of all of the evidence before it, that more than fifty-five per cent of the employees of the respondent in the bargaining unit set out above, at the time the application was made, were members of the applicant on March 25, 1986, the terminal date fixed for this application and the date which the Board determines under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

20. A certificate will issue to the applicant.

1838-86-R The Canadian Union of Public Employees, Applicant, v. The Staff Association Waterloo County Health Unit, Respondent, v. **The Regional Municipality of Waterloo**, Intervener

Union Successor Status - Union members having one vote to amend constitution and approve merger with staff association - Separate vote required to permit merger - Application dismissed

BEFORE: *Patricia Hughes*, Vice-Chairman, and Board Members *D. H. Blair* and *W. F. Rutherford*.

APPEARANCES: *J. H. Bird*, *Richard Anderson*, *Carol DeGroot* and *Patti Kraatz* for the applicant;

Mark Whalen and Geoff MacGregor for the respondent; E. L. Moore and G. A. Brillinger for the intervener.

DECISION OF PATRICIA HUGHES, VICE-CHAIRMAN, AND BOARD MEMBER D. H. BLAIR; December 5, 1986

1. In this application the applicant union ("C.U.P.E.") seeks a declaration that it is the successor to the Staff Association Waterloo County Health Unit ("the Staff Association" or "the Association") under section 62 of the *Labour Relations Act* ("the Act").

2. The applicant filed materials with the Board indicating the process by which C.U.P.E. Local 1883 and the Staff Association merged. The employer requested a hearing into this matter but raised no specific concerns.

3. In an oral decision at the hearing, we dismissed the application, giving brief reasons for doing so. We now put those reasons in writing.

4. In examining the materials filed with the Board, it became apparent that the members of the Staff Association had participated only in one vote, whereas two votes were required. The Staff Association's Constitution did not previously provide for mergers. The Staff Association accordingly amended its Constitution to so allow and it followed the required procedures in doing so. The Constitution was thus amended by a two-thirds majority to provide as follows:

15.01 The Association may, by a majority vote of the members present and voting at a meeting called for among other things that purpose, merge, amalgamate or transfer its jurisdiction, rights, privileges, duties, liabilities and assets with or to another organization or a Local thereof.

5. However, the Association did not go on to hold a vote with respect to the proposed merger with C.U.P.E. Local 1883 and the Association. The vote which was reported as "32 votes for the Merger" and "13 votes against the Merger" was in fact "32 Votes for the Amendment to the Constitution" and "13 votes against Amendment to the Constitution".

6. Carol DeGroot, Vice-President of the Association during the operative time, testified that there had been considerable discussion about the proposed merger with C.U.P.E., that a question and answer sheet had been distributed and that the employees understood they were voting for the specific merger. She testified further that the Minutes of the July 24, 1986 meeting, at which the vote had been held, were adopted, showing the vote for and against the merger and that they had not been challenged. The Association's executive evidently believed that a single vote accomplished both objectives (amending the Constitution and approving the specific merger) at the same time. That was not in fact the case.

7. The union's representative submitted that any defect was in the wording of the motion. However, in our view, that is not the difficulty with this application. By the amendment to its Constitution, the Staff Association was given the power to merge with another organization by following certain procedures. Those procedures were not followed in this case, albeit inadvertently. The employees did not express their wishes with respect to the merging of their Association with C.U.P.E. Local 1883 in the July 24, 1986 vote. The importance of the employees' approval is discussed in *L. M. L. Foods Inc.*, [1985] OLBR Rep. Aug. 1252. We are not prepared to infer what was in the minds of the employees when they voted on July 24, 1986. The only evidence before us is that they voted to amend the Association's Constitution to permit mergers. There is no evidence before us that they voted to permit the specific merger between the Association and C.U.P.E.

Local 1883. We find therefore that there has been no merger of the Association with C.U.P.E. Local 1883.

8. Accordingly, this application is dismissed.

DECISION OF BOARD MEMBER W. F. RUTHERFORD;

I dissent. I would have given CUPE successor status immediately.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING NOVEMBER 1986

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1519-85-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 924, Stratford (Applicant) v. The Stratford Shakespearean Festival Foundation of Canada (Respondent)

Unit: "all theatrical wardrobe mistresses/masters and wardrobe attendants/dressers in the employ of the respondent in Stratford, save and except head of wardrobe and persons above the rank of head of wardrobe" (15 employees in unit)

2026-85-R: Ontario Nurses' Association (Applicant) v. The Doctor Joseph O. Ruddy General Hospital (Respondent)

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent in Whitby, save and except nurse managers, persons above the rank of nurse manager, discharge planner, staff education co-ordinator, and persons regularly employed for not more than twenty-four (24) hours per week" (35 employees in unit)

Unit #2: "all registered and graduate nurses employed in a nursing capacity by the respondent, regularly employed for not more than twenty-four (24) hours per week, save and except nurse managers, persons above the rank of nurse manager, discharge planner and staff education co-ordinator" (36 employees in unit)

2152-85-R: Labourers' International Union Oil and Gas Technicians, Service, Domestic and General Workers Local 1267 (Applicant) v. Central Supply Company (1972) Limited (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period" (39 employees in unit) (*Clarity Note*)

3020-85-R: International Brotherhood of Painters and Allied Trades - Local Union 1891 (Applicant) v. Elmont Construction Limited (Respondent)

Unit #1: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: "all painters and painters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1357-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. V. M. Bros. Construction Limited (Respondent)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (29 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (29 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #3: "all truck drivers, carpenters and carpenters' apprentices and all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (29 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1439-86-R: United Brotherhood of Carpenters & Joiners of America, Local Union 27 (Applicant) v. P.A. Scaffolding Inc., Aluma Systems Ltd., Aluma Systems Corp., Aluma Systems Incorporated, All-Scaff Inc., Umacs of Canada Inc., Umacs Erectors Ltd. (Respondents)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondents, namely P.A. Scaffolding Inc., All-Scaff Inc., Umacs of Canada Inc. and Umacs Erectors Ltd., in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondents, namely P.A. Scaffolding Inc., All-Scaff Inc., Umacs of Canada Inc. and Umacs Erectors Ltd., in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar and the Towns of Ajax and Pickering in the Regional Municipality of Durham, but excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit) (*Having regard to the agreement of the parties*)

1460-86-R: United Brotherhood of Carpenters and Joiners of America, Local 1030 (Applicant) v. Ken Mar Door Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Township of Richmond, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period" (45 employees in unit) (*Having regard to the agreement of the parties*)

1555-86-R: Labourers' International Union of North America, Local 607 (Applicant) v. Nor-West Concrete Ltd. and/or Anttila Ceramic Tile Ltd. (Respondents) v. Group of Employees (Objectors)

Unit #1: "all construction labourers in the employ of Nor-West Concrete Ltd. and Anttila Ceramic Tile Ltd. in the industrial, commercial and institutional sector of the construction industry in the province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit) (*Clarity Note*)

Unit #2: "all construction labourers in the employ of Nor-West Concrete Ltd. and Anttila Ceramic Tile Ltd. in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit) (*Clarity Note*)

1628-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. Denjon Construction Ltd. (Respondent)

Unit: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same and all construction labourers and truck drivers in the employ of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit) (*Having regard to the agreement of the parties*)

1629-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. Denjon Construction Ltd. (Respondent)

Unit: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same and all truck drivers in the employ of the respondent in the District of Kenora including the Patricia portion, but excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit) (*Having regard to the agreement of the parties*)

1659-86-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW - Canada) (Applicant) v. Multiver Ontario Ltd. (Respondent)

Unit: "all employees of the respondent in Hawkesbury, Ontario, save and except foremen, those above the rank of foreman, office and sales staff" (58 employees in unit)

1675-86-R: Canadian Union of Public Employees (Applicant) v. Chatham Kent Women's Centre Incorporated (Respondent) v. Employee (Objector)

Unit #1: "all employees of the respondent in Chatham, Ontario save and except the Assistant Administrator, and persons regularly employed for not more than twenty-four hours per week" (14 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent in Chatham, Ontario regularly employed for not more than twenty-four hours per week save and except the Assistant Administrator and persons above the rank of Assistant Administrator" (14 employees in unit) (*Having regard to the agreement of the parties*)

1690-86-R: United Brotherhood of Carpenters and Joiners of America, Local 2679 (Applicant) v. Pinehurst Woodworking Company Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at Brampton, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff" (38 employees in unit) (*Having regard to the agreement of the parties*)

1764-86-R: Teamsters Local Union No. 230, Ready Mix Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Carp Concrete Limited (Respondent)

Unit: "all employees of the respondent in the Regional Municipality of Ottawa-Carleton, save and except foremen, those above the rank of foreman, clerical, office and sales staff" (13 employees in unit) (*Having regard to the agreement of the parties*)

1835-86-R: United Steelworkers of America (Applicant) v. Weld-O-Matic Machines Company Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at Hamilton, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period" (8 employees in unit) (*Having regard to the agreement of the parties*)

1852-86-R: Service Employees Union, Local 183 (Applicant) v. Bruce Hooper Food Services Ltd. c.o.b. as Hooper's Restaurant (Respondent)

Unit #1: "all employees of the respondent in the City of Belleville save and except the manager, persons

above the rank of manager, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period" (27 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent in the City of Belleville regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except the manager and persons above the rank of manager" (27 employees in unit) (*Having regard to the agreement of the parties*)

1855-86-R: Canadian Union of Public Employees (Applicant) v. Orde Day Care Centre (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto save and except Day Care Co-ordinator, persons above the rank of Day Care Co-ordinator, and students employed during the school vacation period" (8 employees in unit) (*Having regard to the agreement of the parties*)

1863-86-R: United Plant Guard Workers of America, Local 1962 (Applicant) v. General Motors of Canada Limited (Respondent)

Unit: "all security guards employed by the respondent in the City of Oshawa, save and except sergeants, persons above the rank of sergeant, office and clerical staff, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and security guards employed by the respondent at its South Plant in the City of Oshawa who are covered by a collective agreement between the parties which expires on October 30, 1987" (35 employees in unit)

1885-86-R: Service Employees Union, Local 183 (Applicant) v. Kawartha Nursing Home (Respondent)

Unit #1: "all employees of the respondent in the City of Peterborough, Ontario save and except registered nurses, office and clerical staff, supervisors and persons above the rank of supervisor" (29 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all registered nurses employed by the respondent in a nursing capacity in the City of Peterborough, Ontario save and except the Director of Care and persons above the Director of Care" (3 employees in unit) (*Having regard to the agreement of the parties*)

1895-86-R: Canadian Union of Postal Workers (Applicant) v. JMP Maintenance Ltd. (Respondent)

Unit #1: "all employees of the respondent in the City of Ottawa, save and except supervisors, persons above the rank of supervisor, and persons regularly employed for not more than twenty-four (24) hours per week" (17 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: (See: *Applications for Certification Dismissed Without Vote*)

1900-86-R: Hotel Motel and Restaurant Employees Union, Local 442 (Applicant) v. VS Services Ltd. (Respondent)

Unit: "all employees of the respondent at its Garden Restaurant at 5827 River Road Niagara Falls, Ontario, save and except supervisors, persons above the rank of supervisor, chefs, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (11 employees in unit) (*Having regard to the agreement of the parties*)

1901-86-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Twistex Yarns Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Cornwall, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff" (21 employees in unit) (*Having regard to the agreement of the parties*)

1902-86-R: International Union of Operating Engineers Local 793 (Applicant) v. R. Mandel Contracting Ltd. (Respondent)

Unit: "all employees of the respondent at the Mattabi Mine Site in the District of Thunder Bay, save and except foremen, persons above the rank of foreman, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (8 employees in unit) (*Having regard to the agreement of the parties*)

1903-86-R: Canadian Union of Public Employees (Applicant) v. North of Superior Community Mental Health Program (Respondent)

Unit: "all employees of the respondent in the District of Thunder Bay, save and except the Executive Director, Director Community Development Program, Clinical Director Mental Health Program, Business Manager and the Administrative Assistant" (20 employees in unit) (*Having regard to the agreement of the parties*)

1913-86-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Loeb Inc. (Respondent)

Unit: "all employees of the respondent at its Cash and Carry operation in the Regional Municipality of Sault Ste. Marie regularly employed for not more than twenty-four (24) hours per week, save and except managers, persons above the rank of manager and persons in bargaining units for which any trade union held bargaining rights as of October 2, 1986" (5 employees in unit) (*Having regard to the agreement of the parties*)

1921-86-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Firestone Canada Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at its Distribution Centre in Metropolitan Toronto, save and except supervisors, those above the rank of supervisor, clerical, office and sales staff" (17 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1924-86-R: United Food & Commercial Workers Union, Local 409 (Applicant) v. Harry Zaminskis (Respondent)

Unit #1: "all employees of the respondent carrying on business as Stedmans Store at Fort Francis save and except manager, persons above the rank of manager, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (10 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent carrying on business as Stedmans Store at Fort Francis regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except manager, persons above the rank of manager and office staff" (9 employees in unit) (*Having regard to the agreement of the parties*)

1967-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. S & A Construction Co. Ltd. (Respondent)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit) (*Clarity Note*)

1999-96-R: Canadian Union of Public Employees (Applicant) v. Grimsby Hydro-Electric Commission (Respondent)

Unit: "all employees of the respondent in Grimsby save and except Line Superintendent, Accounting Billing

Supervisor, persons above the rank of Line Superintendent and Accounting Billing Supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period" (9 employees in unit) (*Having regard to the agreement of the parties*)

2013-86-R: Labourers' International Union of North America, Local 1081 (Applicant) v. Kast Engineering & Construction Ltd. (Respondent)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in the County of Brant and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Norfolk, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

2032-86-R: United Steelworkers of America (Applicant) v. Royal Tire Service Limited (Respondent)

Unit: "all employees of the respondent in the City of Sault Ste. Marie save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period" (9 employees in unit) (*Having regard to the agreement of the parties*)

2033-86-R: United Food and Commercial Workers International Union AFL:CIO:CLC (Applicant) v. Quinte Meat Products Ltd. (Respondent)

Unit: "all employees of the respondent in the Village of Wellington regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except managers, persons above the rank of manager, office, clerical and sales staff" (10 employees in unit) (*Having regard to the agreement of the parties*)

2035-86-R: International Union United Plant Guard Workers of America Local 1962 (Applicant) v. Board of Management for the Metropolitan Toronto Zoo (Respondent)

Unit: "all security guards employed by the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, employees in bargaining units for which any trade union held bargaining rights as of October 14, 1986, being the date of application" (6 employees in unit) (*Having regard to the agreement of the parties*)

2055-86-R: Local Union 527 United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL:CIO:CLC (Applicant) v. Cambell-Cox Fabrications Limited (Respondent)

Unit: "all employees of the respondent at Guelph save and except foremen, persons above the rank of foreman, office and sales staff" (21 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2058-86-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. National Drug Limited (Respondent)

Unit: "all office and clerical employees of the respondent in the Regional Municipality of Ottawa-Carleton, save and except supervisors and buyers, persons above the rank of supervisor and buyer, sales staff and employees in bargaining units for which any trade union held bargaining rights as of October 17, 1986" (7 employees in unit) (*Having regard to the agreement of the parties*)

2061-86-R: Labourers' International Union of North America, Local 1081 (Applicant) v. C & P Lafontaine Excavating Ltd. (Respondent)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Unit #2: "all construction workers in the employ of the respondent in the County of Brant and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Norfolk in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2062-86-R: Lumber and Sawmill Workers' Union Local 2693 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Spoljarich Contracting Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit) (*Clarity Note*)

2089-86-R: United Brotherhood of Carpenters and Joiners of America, Local 2679 (Applicant) v. Business Accessories Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Cambridge, save and except foremen, persons above the rank of foreman, office and sales staff" (57 employees in unit) (*Having regard to the agreement of the parties*)

2109-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Rabito Sewar and Watermain Contractors Ltd. (Respondent)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, in all sectors of the construction industry excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

2111-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Pelar Construction Ltd. (Respondent)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in the County of Simcoe and the District Municipality of Muskoka, in all sectors of the construction industry excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

2128-86-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.P.I.O., C.L.C. (Applicant) v. Woodingford Lodge (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of the respondent in Woodstock, Ontario save and except registered nurses, supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (125 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: "all employees of the respondent in Woodstock, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except registered nurses, supervisors, persons above the rank of supervisor and office and clerical staff" (19 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2132-86-R: International Brotherhood of Painters and Allied Trades, Local 557 (Applicant) v. Archie Pad (Respondent)

Unit #1: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Unit #2: "all painters and painters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2160-86-R: United Food & Commercial Workers' International Union, Local 633 AFL-CIO-CLC (Applicant) v. Morrison's Meat Packers Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Township of North Dumfries, save and except foremen and persons above the rank of foreman, office and clerical staff, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period" (21 employees in unit) (*Having regard to the agreement of the parties*)

2172-86-R: Ontario Public Service Employees Union (Applicant) v. Lynwood Hall Children's Centre (Respondent)

Unit #1: "all employees of the respondent in Hamilton, Ontario, save and except supervisors, persons above the rank of supervisor, office and clerical employees and employees regularly employed for not more than 24 hours per week" (23 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: "all employees of the respondent in Hamilton, Ontario, regularly employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor, office and clerical employees" (22 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2173-86-R: Service Employees Union, Local 478 (Applicant) v. Northern Communications Services Ltd. (Respondent)

Unit: "all employees of the respondent in Sudbury, save and except supervisors, persons above the rank of supervisors, sales, office and warehouse personnel, equipment repair technicians, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period" (18 employees in unit) (*Having regard to the agreement of the parties*)

2214-86-R: Local Union #473, Sheet Metal Workers' International Association (Applicant) v. Sun Ventilating Co. Ltd. (Respondent)

Unit #1: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Unit #2: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, excluding the industrial, commercial and institutional sector, save and excluding non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

2217-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Globfin Developments Limited (Respondent)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

2434-85-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Simcoe County Board of Education (Respondent) v. Association des Enseignants et Enseignants Suppléants de Simcoe Secondaire (Objectors)

Unit: "all occasional teachers employed by the respondent in its secondary schools in the County of Simcoe, save and except occasional teachers employed by the respondent in its secondary schools in classes where français is the language of instruction in accordance with part XI of the *Education Act* and employees in bargaining units for which any trade union held bargaining rights on January 6, 1986" (235 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list		160
Number of persons who cast ballots	115	
Number of spoiled ballots		5
Number of ballots marked in favour of applicant		91
Number of ballots marked against applicant		15
Ballots segregated and not counted		4

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

0256-85-R: Ontario Public School Teachers' Federation (Applicant) v. The Carleton Board of Education (Respondent)

Unit: "all occasional teachers employed by the respondent in its elementary panel in the Regional Municipality of Ottawa-Carleton, save and except employees in bargaining units for which any trade union held bargaining rights as of May 1, 1985" (460 employees in unit) (*Clarity Note*)

Number of names of persons on revised voters' list		459
Number of persons who cast ballots	282	
Number of spoiled ballots		6
Number of ballots marked in favour of applicant		252
Number of ballots marked against applicant		24

1761-86-R: Labourers' International Union of North America, Local 506 (Applicant) v. Panex Show Services Ltd. (Respondent) v. Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America (Intervener)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and clerical staff and employees in bargaining units for which any trade union held bargaining rights as of September 18, 1986, being the date of application, except the bargaining unit described in the certificate issued by the Board to the intervener on February 20, 1984" (9 employees in unit)

Number of names of persons on revised voters' list		10
Number of persons who cast ballots	10	
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	9	
Number of segregated ballots cast by persons whose names appear on voters' list	1	
Number of ballots marked in favour of applicant		6
Number of ballots marked in favour of intervener		4

Applications for Certification Dismissed Without Vote

1385-85-R: Labourers' International Union of North America, Local 491 (Applicant) v. Klimack Construction Limited (Respondent) v. Group of Employees (Objectors) (25 employees in unit)

1774-86-R: Labourers' International Union of North America, Local 607 (Applicant) v. Copper Cliff Mechanical Contractors Ltd. (Respondent) (29 employees in unit)

1806-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. Dominion Mechanical Contractors Inc. (Respondent) (3 employees in unit)

1819-86-R: United Headwear, Optical and Allied Workers Union of Canada, Local 4 (Applicant) v. Plastic Contact Lens Company (Canada) Ltd. (Respondent) (26 employees in unit)

1833-86-R: Ontario Nurses' Association (Applicant) v. Women's College Hospital (Respondent) (232 employees in unit)

1895-86-R: Canadian Union of Postal Workers (Applicant) v. JMP Maintenance Ltd. (Respondent) (17 employees in unit)

Unit #1: (See *Bargaining Agents Certified Without Vote*)

1896-86-R: Ontario Public School Teachers' Federation (Applicant) v. The Ottawa Board of Education (Respondent) (547 employees in unit)

2059-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Greenwin Property Management (as agent for) Kiplinvest Corporation (Respondent) (3 employees in unit)

2073-86-R: United Plant Guard Workers of America, Local 1962 (Applicant) v. National Protective Services Ltd. (Respondent) (240 employees in unit)

2103-86-R: Communications and Electrical Workers of Canada (Applicant) v. Holophane Division, Manville Canada Inc. (Respondent) v. Group of Employees (Objectors) (36 employees in unit)

2144-86-R: Canadian Union of Public Employees (Applicant) v. Corporation of the County of Perth (Respondent) (12 employees in unit)

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

0809-86-R: Laundry and Linen Drivers and Industrial Workers Union, Teamsters Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Walker Atlantic Glass Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at 175 Commander Boulevard, Scarborough, Ontario, save and except a supervisor, persons above the rank of supervisor, office clerical and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period" (91 employees in unit)

Number of names of persons on revised voters' list	86
Number of persons who cast ballots	82
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	81
Number of segregated ballots cast by persons whose names appear on voters' list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	36
Number of ballots marked against applicant	41

Ballots segregated and not counted

5

0847-86-R: Raymond Bussink (Applicant) v. United Food & Commercial Workers International Union, Local 617P (Respondent)

Unit: "all employees of the respondent in the plant, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation periods" (4 employees in unit)

Number of names of persons on list as originally prepared by employer		5
Number of persons who cast ballots	5	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		5

0907-86-R: Labourers' International Union of North America, Local 493 (Applicant) v. Mayco Homes North Bay Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors within a radius of 33 kilometers (approximately 20 miles) of the North Bay post office, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

Number of names of persons on revised voters' list		12
Number of persons who cast ballots	11	
Number of ballots marked in favour of applicant		2
Number of ballots marked against applicant		9

Applications for Certification Withdrawn

1883-86-R: Labourers' International Union of North America, Local 607 (Applicant) v. Clara Industrial Services Ltd. (Respondent)

2031-86-R: United Steelworkers of America (Applicant) v. Renfrew Tape Ltd. (Respondent)

2088-86-R: Service Employees International Union, Local 204, affiliated with the S.E.I.U., AFL-CIO-CLC (Applicant) v. Concorde Maintenance Ltd. (Respondent)

2099-86-R: Ontario Nurses' Association (Applicant) v. Richmond Nursing Home (Respondent)

2156-86-R: Employees' Committee Seeburn Metal Products Beaverton Division (Applicant) v. Seeburn Metal Products Ltd. (Respondent)

2242-86-R: United Steelworkers of America (Applicant) v. Doug McCallum the Mover Ltd. (Respondent)

2246-86-R: United Brotherhood of Carpenters & Joiners of America, Local Union 27 (Applicant) v. Sera Construction Ltd. (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

2140-86-R: United Steelworkers of America (Applicant) v. G.K.L. Industries Limited (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1751-86-R: Health, Office & Professional Employees, Division of Local 206, Retail, Commercial & Industrial Union, Chartered by the United Food & Commercial Workers International Union (Applicant) v. Preston

Springs Gardens Retirement home, and Milbrun Holdings Limited, and Deem Management Services Limited, and 566625 Ontario Ltd. c.o.b. as Madison Management (Respondents) (*Withdrawn*)

2550-86-R: United Brotherhood of Carpenters and Joiners of America, Carpenters District Council of Toronto and Vicinity (Applicant) v. Colt Contracting Company Limited and Pony Construction Management Limited (Respondents) (*Granted*)

0681-86-R: Teamsters Local Union No. 230, Ready Mix Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers (Applicant) v. Millwork & Building Supplies Limited, R & R Insulators Limited (Respondents) (*Dismissed*)

1474-86-R: Carpenters District Council of Toronto and Vicinity on behalf of Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Umacs Construction Limited, Umacs of Canada Inc., Umacs Erectors Ltd., P.A. Scaffolding Inc., Aluma Systems Ltd., Aluma Systems Corp., Aluma Systems Incorporated and All-Scaff Inc. (Respondents) (*Granted*)

1596-86-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Ron Aube, Ron Aube General Contracting, Trans Canada Painters Inc., 132644 Canada Limited and Canada Ltd. 1604-83 (Respondents) (*Granted*)

SALE OF A BUSINESS

2550-84-R: United Brotherhood of Carpenters and Joiners of America, Carpenters District Council of Toronto and Vicinity (Applicant) v. Colt Contracting Company Limited and Pony Construction Management Limited (Respondents) (*Dismissed*)

1799-85-R: United Food & Commercial Workers International Union, Local 409 (Applicant) v. Canada Safeway Limited and Current River Foods Ltd. (Respondent) v. Group of Employees (Objectors) (*Granted*)

2866-85-R: United Food & Commercial Workers International Union, Locals 175 & 633 (Applicants) v. New Dominion Stores Inc. and The Great Atlantic & Pacific Company of Canada Limited (Respondents) v. Retail, Wholesale & Department Store Union, Local 528 (Intervener) (*Granted*)

2867-85-R; 2868-85-R; 3067-85-R; 0882-86-R: United Food & Commercial Workers International Union, Locals 175 & 633 (Applicants) v. New Dominion Stores Inc. and The Great Atlantic & Pacific Company of Canada Limited (Respondents) v. Retail, Wholesale & Department Store Union, Local 414 AFL-CIO-CLC (Intervener) (*Granted*)

0681-86-R: Teamsters Local Union No. 230, Ready Mix Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers (Applicant) v. Millwork & Building Supplies Limited, R & R Insulators Limited (Respondents) (*Dismissed*)

1754-86-R: Retail, Wholesale and Department Store Union and its Local 448 (Applicant) v. 484826 Limited (known as the Clifton Arms Hotel) (Respondent) (*Withdrawn*)

1817-86-R: Operative Plasterers' & Cement Masons' International Association of Canada & the United States, Local 598 (Applicant) v. Yorkview Concrete Finishing Ltd., 662694 Ontario Limited c.o.b. as Viceroy Concrete Finishing (Applicant) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1436-86-R: Cindy Gallagher (Applicant) v. United Food & Commercial Workers International Union (Local 175) (Respondent) v. Boucher's Amherstview Supermarket (Intervener) (*Dismissed*)

1638-86-R: Joan Sharrow (Applicant) v. Service Employees Union, Local 210, affiliated with Service Employees International Union (Respondent) v. Lapointe-Fisher Nursing Home Ltd. (Intervener) (*Withdrawn*)

1801-86-R: Harry Williams (Applicant) v. Service Employees Union, Local 183 (Respondent) v. Gardiner's Supermarket Limited (Intervener) (*Granted*)

1983-86-R: Employees of the Corporation of the Town of Keewatin, Public Works & Sewer & Water Divisions (Applicant) v. Teamsters Union Local 990, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent) (*Withdrawn*)

1986-86-R: Adelaide Ricketts and Gertrude Jones, on behalf of all employees of Perma Foam Limited who wish to terminate the bargaining rights (Applicants) v. Amalgamated Clothing & Textile Workers Union (Respondent) v. Perma Foam Limited (Intervener) (*Withdrawn*)

2087-86-R: Douglas Gustafson (Applicant) v. Labourers' International Union, Local 183 (Respondent) v. Mayhurst Realty Limited (Intervener) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

2223-86-U: Camco Inc. (Applicant) v. United Electrical, Radio & Machine Workers of Canada, Local 550 (the 'Union'), Gordon Waddell, et al. (Respondents) (*Granted*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1550-85-U: William James Tearse (Complainant) v. Canadian Union of Public Employees Local No. 2497 and Dixon Hall (Respondents) (*Dismissed*)

2285-85-U: Paul Drisdelle (Complainant) v. C.U.P.E. Local No. 43 (Respondent) v. The Municipality of Metropolitan Toronto (Intervener) (*Dismissed*)

2442-85-U: Tony Medeiros and Joe DaCosta (Complainant) v. Canadian Union of Public Employees and its Local 1479 (Respondent) v. Frontenac-Lennox & Addington County Roman Catholic Separate School Board (Intervener) (*Dismissed*)

3181-85-U: Patty Konkle (Complainant) v. Tridon Employees' Union (Respondent) (*Dismissed*)

0506-86-U: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Lodge 128 (Complainant) v. Teledyne Industries Canada Limited (Respondent) (*Withdrawn*)

0512-86-U: Ontario Nurses' Association (Complainant) v. Ottawa Civic Hospital and Ontario Hospital Association (Respondent) (*Withdrawn*)

0570-86-U: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Lodge 128 (Complainant) v. Teledyne Industries Canada Limited (Respondent) (*Withdrawn*)

0647-86-U; 0660-86-U: Canadian Union of Public Employees (Complainant) v. Long Island Day Care Centre Incorporated (Respondent) (*Withdrawn*)

0792-86-U: Fiona D. Grose (Complainant) v. York University Staff Association (YUSA) (Respondent) (*Withdrawn*)

1324-86-U: Retail, Wholesale & Department Store Union, Local 414 (Complainant) v. A. L. Brooks Limited and Mr. Ziggy Trofimczuk (Respondents) (*Withdrawn*)

1345-86-U: William Smith (Complainant) v. The Hamilton Spectator (Respondent) v. Graphic Communications International Union, Local 669 (Intervener) (*Dismissed*)

1427-86-U: James Clarke, Norman Davidson, Al Forsyth, Barry Fraser, Terry Fraser, Gerry Maloney (Complainants) v. International Brotherhood of Electrical Workers, International Brotherhood of Electrical Workers Local 105, K.G. Rose, P. Dillon, T. Beattie, Jaddco Anderson Ltd. and The Hamilton Electrical Contractors Association (Respondents) (*Dismissed*)

1473-86-U: Brewery, Malt & Soft Drink Workers, Local 304 (Complainant) v. Fortier Beverages Limited (Respondent) (*Withdrawn*)

1505-86-U: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Complainant) v. The Westin Hotel (Respondent) (*Withdrawn*)

1637-86-U: Joan Sharrow (Complainant) v. Service Employees Union, Local 210, affiliated with Service Employees International Union (Respondent) v. Lapointe-Fisher Nursing Home Ltd. (Intervener) (*Withdrawn*)

1654-86-U: Labourers' International Union of North America, Local 183 (Complainant) v. Jane Wilson Towers Limited (Respondent) (*Withdrawn*)

1680-86-U: United Food & Commercial Workers' International Union (Complainant) v. Faculty Club of McMaster University (Respondent) (*Withdrawn*)

1704-86-U: David Highmore (Complainant) v. United Association of Plumbing & Pipe Fitting Ind. (Respondent) (*Withdrawn*)

1707-86-U: Mike Joffe (Complainant) v. Local 353, I.B.E.W. (Respondent) (*Withdrawn*)

1753-86-U: Service Employees Union Local 478 (Complainant) v. Lajambe Forest Products Limited (Respondent) (*Withdrawn*)

1769-86-U: Labourers' International Union of North America, Local 183 (Complainant) v. Olympia & York Developments Limited (Respondent) (*Withdrawn*)

1830-86-U: Retail, Wholesale & Department Store Union, AFL-CIO-CLC (Complainant) v. Sunkist Fruit Markets, Toronto Ltd. (Respondent) (*Withdrawn*)

1877-86-U: Christian Labour Association of Canada (Complainant) v. Maplehurst Hospital Ltd. (Respondent) (*Withdrawn*)

1892-86-U: The Ontario Public Service Employee's Union (Complainant) v. Cochrane Temiskaming Resource Centre (Respondent) (*Withdrawn*)

1929-86-U: United Food & Commercial Workers International Union, Local 1000A (Complainant) v. Sears Canada Inc. (Respondents) (*Withdrawn*)

1941-86-U: Ontario Nurses' Association (Complainant) v. Notre-Dame Hospital (Respondent) (*Withdrawn*)

1948-86-U: Clifford Hudspith (Complainant) v. National Union of Provincial Government Employees (Respondent) (*Withdrawn*)

1951-86-U: Sonya Beddows (Complainant) v. United Auto Workers Union Local 1285 (Respondent) (*Withdrawn*)

1952-86-U: Marion Johnson (Complainant) v. United Steelworkers of America (Respondent) (*Withdrawn*)

1963-86-U: Donald E. Berry (Complainant) v. Allan Earnshaw (Brewer's Retail) (Respondent) (*Dismissed*)

1979-86-U: Larry Fraser (Complainant) v. Teamsters Local 1247, Chemical, Energy and Allied Workers (Respondent) v. Victory Soya Mills, Division of Central Soya of Canada Ltd. (Intervener) (*Withdrawn*)

1985-86-U: Ronald A. Puttock (Complainant) v. Claude Cournoyer (Respondent) (*Withdrawn*)

2018-86-U: Hotel Employees & Restaurant Employees Union, Local 75 (Complainant) v. Bentley's Plus Seafood Restaurant (Respondent) (*Withdrawn*)

2019-86-U: Laundry & Linen Drivers & Industrial Workers, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Easy Enterprises (Respondent) (*Withdrawn*)

2041-86-U: Labourers' International Union of North America, Local 597 (Complainant) v. Milburn Interior Contracting (Respondent) (*Withdrawn*)

2050-86-U: Fernando Monteiro (Complainant) v. United Food & Commercial Workers International Union, Local 709-3 (Respondent) (*Withdrawn*)

2063-86-U: London & District Service Workers' Union, Local 220 (Complainant) v. Maplewood Nursing Home (Respondent) (*Withdrawn*)

2068-86-U; 2069-86-U: Doris Dorion (Complainant) v. Independent Canadian Steelworkers' Union, Local 104 (Respondent) (*Withdrawn*)

2070-86-U: Elizabeth Pilon (Complainant) v. Independent Canadian Steelworkers' Union, Local 104 (Respondent) (*Withdrawn*)

2075-86-U: Mr. Brian Patriquin (Complainant) v. Hotel Employees Restaurant Employees (Local 75) (Respondent) (*Withdrawn*)

2119-86-U: Local 280 of the International Beverage Dispensers' & Bartenders' Union of the Hotel & Restaurant Employees, & Bartenders' International Union (Complainant) v. Jay Jay's Tavern (Respondent) (*Withdrawn*)

2126-86-U: Margaret Beauchamp (Complainant) v. Maria Wysocki, Donna Conrad and Ontario Public Service Employee's Union (Respondents) (*Withdrawn*)

2154-86-U: United Food & Commercial Workers, Local 206, chartered by the United Food & Commercial Workers International Union (Complainant) v. Herman Miller Canada, Inc. (Respondent) (*Withdrawn*)

2181-86-U: Dennis Woodman (Complainant) v. Retail, Wholesale & Department Store Union, Local 414 (Respondent) (*Withdrawn*)

2185-86-U: Ontario Public Service Employee's Union (Complainant) v. Encare, A Division of Beaver Foods Ltd. (Respondent) (*Withdrawn*)

2193-86-U: Teamsters Local Union No. 230, Ready Mix, Building Supply, Hydro & Construction Drivers, Warehousemen & Helpers, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Carp Concrete Limited (Respondent) (*Withdrawn*)

2194-86-U: Lumber & Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters & Joiners of America (Complainant) v. Spoljarich Contracting Ltd. (Respondent) (*Withdrawn*)

2283-86-U: Local 1227 of the United Food & Commercial Workers International Union AFL-CIO-CLC (Complainant) v. F. W. Fearman Company Limited (Respondent) (*Withdrawn*)

JURISDICTIONAL DISPUTES

1484-86-JD: The International Brotherhood of Painters & Allied Trades, Local 1795 (Complainant) v. J.C. Moag Co. Ltd., and United Brotherhood of Carpenters & Joiners of America Local 785 (Respondents) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

1346-86-M: The Regional Municipality of Ottawa-Carleton (Applicant) v. C.U.P.E., Local 503 (Respondent) (*Withdrawn*) (*Having regard to the agreement of the parties*)

1734-86-M: The Association of Allied Health Professionals: Ontario (Applicant) v. The Salvation Army Grace General Hospital (Respondent) (*Dismissed*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

0947-86-OH: David Kerr (Complainant) v. G.K.L. Industries Limited (Respondent) (*Withdrawn*)

1571-86-OH: Keith Morris (Complainant) v. WFLTD (Respondent) (*Withdrawn*)

1968-86-OH: John G. Leger (Complainant) v. Resco Chemicals & Colors Ltd. (Respondent) (*Dismissed*)

1984-86-OH: Raymond Doucette (Complainant) v. Schenectady Chemicals (Re: Syd Saunders) (Respondent) (*Withdrawn*)

1990-86-OH: Gurdeep Murker (Complainant) v. Mond Ind. (1983) Ltd. (Respondent) (*Dismissed*)

1991-86-OH: Maureen Mary Watt (Complainant) v. The Excelsior Life Insurance Company (Respondent) (*Dismissed*)

1992-86-OH: Joe Lewis (Complainant) v. Ford Motor Co. Management (Respondent) (*Withdrawn*)

2021-86-OH: Ivana Varrasso (Complainant) v. Waterline Products Co. Limited (Respondent) (*Withdrawn*)

2037-86-OH: Canadian Union of Public Employees (Complainant) v. Corporation of the City of Thunder Bay (Respondent) (*Withdrawn*)

2293-86-OH: Gloria Phillips (Complainant) v. Van Dresser Limited (Respondent) (*Withdrawn*)

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0470-85-M: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Attica Investments Inc. c.o.b. as Fairbank Carpentry and E & R Carpentry Inc. (Respondent) (*Dismissed*)

2853-85-M: Labourers' International Union of North America, Local 183 (Applicant) v. Frank Plastina Investments Limited, Sherwood Village Homes Inc. c.o.b. under the firm name and style of Grand Valley Homes (Respondents) (*Granted*)

0272-86-M: United Brotherhood of Carpenters & Joiners of America, Local 1316 (Applicant) v. Drycoustic Construction Limited (Respondent) (*Granted*)

0302-86-M: Labourers' International Union of North America, Local 1089 (Applicant) v. Area Construction Inc. (Respondent) (*Withdrawn*)

0571-86-U: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Lodge 128 (Applicant) v. Teledyne Industries Canada Limited (Respondent) (*Withdrawn*)

0608-86-M: Labourers' International Union of North America, Local 247 (Applicant) v. M. Sullivan and Son (Respondent) (*Withdrawn*)

1551-86-M: International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. Yorkview Electric Co. Ltd. (Respondent) (*Granted*)

1611-86-M: Ontario Council of the International Brotherhood of Painters & Allied Trades and International Brotherhood of Painters & Allied Trades, Local 205 (Applicant) v. Maurice's Industrial & Commercial Sand-blasting & Painting Contractors (Respondent) (*Granted*)

1651-86-M: United Brotherhood of Carpenters & Joiners of America, Local Union 27 (Applicant) v. Phoenix Contractors, Division of 495087 Ontario Ltd. (Respondent) (*Granted*)

1677-86-M: Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen and Local 7 Canada (Applicants) v. De Marinis (DMA) Incorporated (Respondent) (*Granted*)

1679-86-M: The United Association of Journeymen & Apprentices of the Plumbing & Pipe Fitting Industry of the United States & Canada, Local Union 463 (Applicant) v. Ontario Hydro (Respondent) (*Withdrawn*)

1692-86-M: United Brotherhood of Carpenters & Joiners of America, Local Union 27 (Applicant) v. A. MacKenzie & Associates Inc. (Respondent) (*Granted*) (*Having regard to the agreement of the parties*)

1722-86-M: Quality Control Council of Canada (Applicant) v. Accuspec Testing Limited (Respondent) (*Granted*)

1771-86-M: The United Association of Journeymen & Apprentices of the Plumbing & Pipe Fitting Industry of the United States & Canada, Local Union 463 (Applicant) v. Metro Mechanical Ltd. (Respondent) (*Withdrawn*)

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1960-86-M: Ontario Sheet Metal Workers' Conference and Sheet Metal Workers' International Association, Local 504 (Applicants) v. Biscombe Enterprises Limited (Respondent) (*Withdrawn*)

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2054-86-M: Sheet Metal Workers International Association, Local 537 (Applicant) v. Helmut Mueller (Respondent) (*Dismissed*)

2076-86-M: Resilient Floorworkers, Local Union 2965 (Applicant) v. Enka Contracting (Respondent) (*Granted*)

2077-86-M: Quality Control Council of Canada (Applicant) v. Canada West Inspection Services Ltd. (Respondent) (*Withdrawn*)

2080-86-M: Labourers' International Union of North America, Local 1059 (Applicant) v. Co-Fo Concrete Forming Construction Limited (Respondent) (*Granted*)

2086-86-M: Ontario Provincial Conference of The International Union of Bricklayers & Allied Craftsmen & Local 29 (Applicant) v. L.T.A. Masonry Ltd. (Respondent) (*Granted*)

2093-86-M: United Brotherhood of Carpenters & Joiners of America, Local Union 785 (Applicant) v. Loser-eit Sales & Services Limited (Respondent) (*Withdrawn*)

2094-86-M: United Brotherhood of Carpenters & Joiners of America, Local Union 785 (Applicant) v. Loser-eit Sales & Services Limited (Respondent) (*Granted*)

2095-86-M: United Brotherhood of Carpenters & Joiners of America, Local Union 785 (Applicant) v. Helmut Kruschat Construction (Respondent) (*Withdrawn*)

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2114-86-M: United Brotherhood of Carpenters & Joiners of America, Local Union 785 (Applicant) v. Dry-coustics Construction Ltd. (Respondent) (*Withdrawn*)

2116-86-M: United Brotherhood of Carpenters & Joiners of America, Local Union 785 (Applicant) v. Alpine Acoustics & Drywall (Respondent) (*Granted*)

2117-86-M: United Brotherhood of Carpenters & Joiners of America, Local Union 785 (Applicant) v. Artek Design Consultants & Concepteurs (Respondent) (*Withdrawn*)

2120-86-M: Ontario Provincial Conference of The International Union of Bricklayers & Allied Craftsmen & Local 7 (Applicant) v. Ottawa Carleton Masonry C. Ltd. (Respondent) (*Granted*)

2121-86-M: Ontario Provincial Conference of The International Union of Bricklayers & Allied Craftsmen & Local 7 (Applicant) v. S. Furtner Masonry (Respondent) (*Granted*)

2122-86-M: Ontario Provincial Conference of The International Union of Bricklayers & Allied Craftsmen & Local 7 (Applicant) v. Joe Arban Contractor Ltd. (Respondent) (*Granted*)

2127-86-M: Drywall, Acoustic, Lathing & Insulation Local 675 of The United Brotherhood of Carpenters & Joiners of America (Applicant) v. M.K. Drywall Ltd. (Respondent) (*Granted*)

2130-86-M: International Association of Bridge, Structural & Ornamental Iron Workers, Local 700 (Applicant) v. Ellis-Don Limited (Respondent) (*Granted*)

2137-86-M: IBEW Construction Council of Ontario Local Union 733 (Applicant) v. McAllister Electric (Respondent) (*Granted*)

2148-86-M: United Brotherhood of Carpenters & Joiners of America, Local Union 785 (Applicant) v. Sipico Drywall Inc. (Respondent) (*Withdrawn*)

2149-86-M: United Brotherhood of Carpenters & Joiners of America, Local Union 785 (Applicant) v. Spring Plastering Ltd. (Respondent) (*Withdrawn*)

2151-86-M: United Brotherhood of Carpenters & Joiners of America, Local Union 785 (Applicant) v. Topaz Construction & Renovation (Respondent) (*Withdrawn*)

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*Ontario Labour Relations Board,
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Bargaining Unit - Build-Up - Certification - Practice and Procedure - Whether students included in part-time unit sought - Whether build-up justifying deferred vote direction - Interim cer-

tificate issued by agreement - Board issuing directions as to exchange of pleadings and production preceding hearing into bargaining unit dispute

TORONTO GENERAL HOSPITAL; RE C.U.P.E.(Jan.) 176

Bargaining Unit - Certification - Charter of Rights and Freedoms - Whether electricians in mining company's maintenance department constituting appropriate unit - Review of Board's general approach in making bargaining unit determinations - No practice in mining industry of separate bargaining units for classifications of skilled employees - Limits on employees' freedom of association reasonable - Application for certification dismissed

KIDD CREEK MINES LTD.; RE I.B.E.W., LOCAL 1687; RE UNITED STEEL-
WORKERS OF AMERICA..... (June) 736

Bargaining Unit - Certification - Construction Industry - Applicant seeking certification in two Board geographic areas while employees only existing in one - Geographic area in which no employees were employed as of the application date is not an appropriate geographic area within the meaning of s.144(1)

E/E FRADEMA MASONRY; RE INTERNATIONAL UNION OF BRICKLAYERS
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Bargaining Unit - Certification - Construction Industry - Certification sought for a single all employee bargaining unit to include both employees engaged in construction work away from the employer's premises as well as employees engaged in non-construction work at employer's factory - Separate construction and non-construction units appropriate because there is no common work force

METRO RAILING LTD.; RE CARPENTERS' UNION, LOCAL 27(Dec.) 1731

Bargaining Unit - Certification - Construction Industry - Practice and Procedure - Whether trade unions other than applicant and intervener should have been given notices of the application and hearing - Issue depending on whether applicant is an affiliated bargaining agent - Whether applicant required to represent all trades employed by the respondent on the application date if the applicant is not an affiliated bargaining agent

PROJECTA ENGINEERING AND CONSTRUCTION INC.; RE LUMBER AND
SAWMILL WORKERS UNION, LOCAL 2693 OF THE CARPENTERS' UNION; RE
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Bargaining Unit - Certification - Construction Industry - Respondent requesting that "gas fitters" be referred to in bargaining unit description - Designation orders not explicitly referring to gas fitters - Board declining to describe a bargaining unit so as to give an affiliated bargaining agent the right to represent employees in trades other than those covered in the designation orders - Not necessary to determine whether gas fitting part of plumbing and steamfitting trades

SUPERIOR PLUMBING & HEATING COMPANY LTD.; RE U.A., LOCAL 46; RE
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Bargaining Unit - Certification - Construction Industry - Whether employees engaged in sheet metal work but not journeymen sheet metal workers or registered sheet metal apprentices should be included in bargaining unit - Board declining to reconsider its practice of excluding such employees as enunciated in *Irvcon Roofing*

NAYLOR GROUP INCORPORATED; RE SHEET METAL WORKERS' INTERNA-
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DES SECURITY SYSTEMS CORPORATION; RE LONDON AND DISTRICT SERVICE WORKERS' UNION, LOCAL 220, S.E.I.U., AFL-CIO-CLC(Nov.)

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Bargaining Unit - Certification - Employee - Whether persons fully funded by external sources and subject to contractual restrictions "employees" - Source of funding only one criteria in determining status - Relationship of persons to employer's work force as whole major consideration - Individuals included in bargaining unit

TELKOM CORPORATION, C.O.B. AS ELECTRONIC WAREHOUSE; RE CANADIAN UNION OF RESTAURANT AND RELATED EMPLOYEES, HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES UNION, LOCAL 88; RE GROUP OF EMPLOYEES.....(June)

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Bargaining Unit - Certification - Practice and Procedure - Board certifying production unit on agreement including quality control but excluding laboratory employees - Union subsequently seeking certification for unit of lab employees - Whether community of interest with production unit or with unorganized office employees - Whether separate unit for laboratory appropriate

RESCO CHEMICALS & COLOURS LTD.; RE TEAMSTERS CHEMICAL ENERGY & ALLIED WORKERS UNION, LOCAL 424; RE GROUP OF EMPLOYEES AND RELATED FILE(Apr.)

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Bargaining Unit - Certification - Reconsideration - Existence of part-time employees not disclosed to Board - Part-time employees swept into bargaining unit when unit defined in tag-end terms - Unit redefined on reconsideration

RESCO CHEMICALS & COLOURS LTD.; RE TEAMSTERS CHEMICAL ENERGY & ALLIED WORKERS UNION, LOCAL 424; RE GROUP OF EMPLOYEES... (Sept.)

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Bargaining Unit - Certification - Representation Vote - Termination - Incumbent union no longer wishing to represent unit - Whether mere existence of incumbent casting doubt on membership evidence - Board not exercising discretion to order representation vote when incumbent union no longer interested in bargaining rights and when applicant has requisite level of membership - Whether application unopposed by incumbent should be considered as a fresh certification application - Whether existing unit still appropriate

SUNNYBROOK FOODS LIMITED; RE U.F.C.W., LOCAL 1000A(July)

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Bargaining Unit - Certification - Union seeking unit of full-time Heritage Language Instructors - Board surveying practice in defining units in education sector - Whether practice of separating full- and part-time employees applicable

METROPOLITAN SEPARATE SCHOOL BOARD; RE C.U.P.E.; RE O.P.S.E.U.; RE ONTARIO ENGLISH CATHOLIC TEACHERS ASSOCIATION(Sept.)

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STRATFORD SHAKESPEAREAN FESTIVAL FOUNDATION OF CANADA; RE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, LOCAL 924, STRATFORD(Nov.)

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Bargaining Unit - Certification - Whether editorial department of TV Guide Magazine an appropriate bargaining unit - Whether departmental bargaining units should be extended beyond newspapers to unorganized parts of publishing industry - Board surveying general consider-

ations in determining appropriate bargaining units and collective bargaining patterns in newspaper industry

TV GUIDE INC.; RE SOUTHERN ONTARIO NEWSPAPER GUILD; RE GROUP OF EMPLOYEES..... (Oct.) 1451

Bargaining Unit - Certification - Whether students employed in a co-operative training program for lab technicians should be excluded from full-time unit

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GERI-CARE NURSING HOME OF CARESSANT CARE LIMITED;
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Bargaining Unit - Certification - Whether unit of Teachers of English in respondent's continuing education programme appropriate - Board reviewing approach to bargaining unit determinations - Unit based on subject-matter taught leading to undue fragmentation - Concerns for "self-determination" and "ease of organization" outweighed - Proposed unit held not appropriate

TORONTO, BOARD OF EDUCATION FOR THE CITY OF; RE O.P.S.E.U.; RE ONTARIO SECONDARY SCHOOL TEACHERS' FEDERATION (June) 900

Bargaining Unit - Certification - Whether "30/30 rule" should be applied to casual relief nurses for purposes of the count - Test used in *York* for occasional teachers not adopted

TORONTO GENERAL HOSPITAL; RE O.N.A. (Dec.) 1855

Bargaining Unit - Construction Industry - Termination - No collective agreement covering non-ICI projects and no work performed by employees in ICI sector - Whether applicants can seek termination of bargaining rights for both the ICI and non-ICI sectors - Whether employees working in only one unit can terminate bargaining rights in other one - Effect of statutory scheme imposing province-wide bargaining in ICI sector

FRED JANTZ MASONRY CONSTRUCTION COMPANY LIMITED; RE MICHAEL C. SZABO ET AL.; RE ONTARIO PROVINCIAL CONFERENCE OF THE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN AND THE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN, LOCAL 23..... (Aug.) 1083

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RE TEXTILE PROCESSORS, SERVICE TRADES, HEALTH CARE, PROFESSIONAL AND TECHNICAL EMPLOYEES INTERNATIONAL UNION,
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COLIBRI CONSTRUCTION INC.; RE LABOURERS' UNION, LOCAL 527 (July) 931

Build-Up - Construction Industry - Two contracts in hand and third contract expected increasing workforce of construction employer from three to twenty-four - Build-up not taken into account - Application of build-up principle in construction industry

COLIBRI CONSTRUCTION INC.; RE LABOURERS' UNION, LOCAL 527 (May) 594

Certification - Adjournment - Construction Industry - Petition - Practice and Procedure - Statement of desire filed with no return mailing address of representative of employees - Acknowledgment of statement sent to first employee on list - No notice of hearing issued by Board in Form 79 - Representative of employees granted adjournment to retain counsel due to inadequate notice of hearing

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LINCOLN COUNTY BOARD OF EDUCATION; RE ONTARIO SECONDARY
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WINDSOR ROMAN CATHOLIC SEPARATE SCHOOL BOARD; RE ONTARIO
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Certification - Bargaining Unit - Build-Up - Practice and Procedure - Whether students included in part-time unit sought - Whether build-up justifying deferred vote direction - Interim certificate issued by agreement - Board issuing directions as to exchange of pleadings and production preceding hearing into bargaining unit dispute

TORONTO GENERAL HOSPITAL; RE C.U.P.E.(Jan.) 176

Certification - Bargaining Unit - Charter of Rights and Freedoms - Constitutional Law - Whether electricians in mining company's maintenance department constituting appropriate unit - Review of Board's general approach in making bargaining unit determinations - No practice in mining industry of separate bargaining units for classifications of skilled employees - Lim-

its on employees' freedom of association reasonable - Application for certification dismissed

KIDD CREEK MINES LTD.; RE I.B.E.W., LOCAL 1687; RE UNITED STEELWORKERS OF AMERICA..... (June)

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Certification - Bargaining Unit - Construction Industry - Applicant seeking certification in two Board geographic areas while employees only existing in one - Geographic area in which no employees were employed as of the application date is not an appropriate geographic area within the meaning of s.144(1)

E/E FRADEMA MASONRY; RE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN, LOCAL 7 CANADA (Dec.)

1685

Certification - Bargaining Unit - Construction Industry - Certification sought for a single all employee bargaining unit to include both employees engaged in construction work away from the employer's premises as well as employees engaged in non-construction work at employer's factory - Separate construction and non-construction units appropriate because there is no common work force

METRO RAILING LTD.; RE CARPENTERS' UNION, LOCAL 27 (Dec.)

1731

Certification - Bargaining Unit - Construction Industry - Practice and Procedure - Whether trade unions other than applicant and intervener should have been given notices of the application and hearing - Issue depending on whether applicant is an affiliated bargaining agent - Whether applicant required to represent all trades employed by the respondent on the application date if the applicant is not an affiliated bargaining agent

PROJECTA ENGINEERING AND CONSTRUCTION INC.; RE LUMBER AND SAWMILL WORKERS UNION, LOCAL 2693 OF THE CARPENTERS' UNION; RE LABOURERS' UNION, LOCAL 607; RE ONTARIO PROVINCIAL CONFERENCE OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE CENCAN CONCRETE & TILE LIMITED..... (Dec.)

1767

Certification - Bargaining Unit - Construction Industry - Respondent requesting that "gas fitters" be referred to in bargaining unit description - Designation orders not explicitly referring to gas fitters - Board declining to describe a bargaining unit so as to give an affiliated bargaining agent the right to represent employees in trades other than those covered in the designation orders - Not necessary to determine whether gas fitting part of plumbing and steamfitting trades

SUPERIOR PLUMBING & HEATING COMPANY LTD.; RE U.A., LOCAL 46; RE GROUP OF EMPLOYEES (Nov.)

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Certification - Bargaining Unit - Construction Industry - Whether employees engaged in sheet metal work but not journeymen sheet metal workers or registered sheet metal apprentices should be included in bargaining unit - Board declining to reconsider its practice of excluding such employees as enunciated in *Irvcon Roofing*

NAYLOR GROUP INCORPORATED; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION LOCAL UNION 537; RE GROUP OF EMPLOYEES .. (Nov.)

1559

Certification - Bargaining Unit - Employees terminated subsequent to application date but prior to terminal date - Same employees then provided to employer by personnel agency - Preliminary objection that no employees left in bargaining unit dismissed

DES SECURITY SYSTEMS CORPORATION; RE LONDON AND DISTRICT SERVICE WORKERS' UNION, LOCAL 220, S.E.I.U., AFL-CIO-CLC (Nov.)

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Certification - Bargaining Unit - Employee - Whether persons fully funded by external sources and subject to contractual restrictions "employees" - Source of funding only one criteria in

determining status - Relationship of persons to employer's work force as whole major consideration - Individuals included in bargaining unit

TELKOM CORPORATION, C.O.B. AS ELECTRONIC WAREHOUSE; RE CANADIAN UNION OF RESTAURANT AND RELATED EMPLOYEES, HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES UNION, LOCAL 88; RE GROUP OF EMPLOYEES..... (June) 892

Certification - Bargaining Unit - Practice and Procedure - Board certifying production unit on agreement including quality control but excluding laboratory employees - Union subsequently seeking certification for unit of lab employees - Whether community of interest with production unit or with unorganized office employees - Whether separate unit for laboratory appropriate

RESCO CHEMICALS & COLOURS LTD.; RE TEAMSTERS CHEMICAL ENERGY & ALLIED WORKERS UNION, LOCAL 424; RE GROUP OF EMPLOYEES AND RELATED FILE..... (Apr.) 544

Certification - Bargaining Unit - Reconsideration - Existence of part-time employees not disclosed to Board - Part-time employees swept into bargaining unit when unit defined in tag-end terms - Unit redefined on reconsideration

RESCO CHEMICALS & COLOURS LTD.; RE TEAMSTERS CHEMICAL ENERGY & ALLIED WORKERS UNION, LOCAL 424; RE GROUP OF EMPLOYEES... (Sept.) 1301

Certification - Bargaining Unit - Representation Vote - Termination - Incumbent union no longer wishing to represent unit - Whether mere existence of incumbent casting doubt on membership evidence - Board not exercising discretion to order representation vote when incumbent union no longer interested in bargaining rights and when applicant has requisite level of membership - Whether application unopposed by incumbent should be considered as a fresh certification application - Whether existing unit still appropriate

SUNNYBROOK FOODS LIMITED; RE U.F.C.W., LOCAL 1000A (July) 1024

Certification - Bargaining Unit - Union seeking unit of full-time Heritage Language Instructors - Board surveying practice in defining units in education sector - Whether practice of separating full- and part-time employees applicable

METROPOLITAN SEPARATE SCHOOL BOARD; RE C.U.P.E.; RE O.P.S.E.U.; RE ONTARIO ENGLISH CATHOLIC TEACHERS ASSOCIATION (Sept.) 1259

Certification - Bargaining Unit - Whether craft bargaining unit consisting of theatrical wardrobe mistresses and dressers appropriate

STRATFORD SHAKESPEAREAN FESTIVAL FOUNDATION OF CANADA; RE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, LOCAL 924, STRATFORD (Nov.) 1577

Certification - Bargaining Unit - Whether editorial department of TV Guide Magazine an appropriate bargaining unit - Whether departmental bargaining units should be extended beyond newspapers to unorganized parts of publishing industry - Board surveying general considerations in determining appropriate bargaining units and collective bargaining patterns in newspaper industry

TV GUIDE INC.; RE SOUTHERN ONTARIO NEWSPAPER GUILD; RE GROUP OF EMPLOYEES..... (Oct.) 1451

- Certification - Bargaining Unit - Whether students employed in a co-operative training program for lab technicians should be excluded from full-time unit
- TRICIL (SARNIA) LIMITED; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; RE TEAMSTERS UNION, LOCAL 880; RE GROUP OF EMPLOYEES(Nov.) 1604
- Certification - Bargaining Unit - Whether there should be separate bargaining units of part-time employees in the rest home and nursing home - Part-time units mirroring full-time units
- GERI-CARE NURSING HOME OF CARESSANT CARE LIMITED;
RE C.L.A.C. (Oct.) 1338
- Certification - Bargaining Unit - Whether "30/30 rule" should be applied to casual relief nurses for purposes of the count - Test used in *York* for occasional teachers not adopted
- TORONTO GENERAL HOSPITAL; RE O.N.A.(Dec.) 1855
- Certification - Bargaining Unit - Whether unit of Teachers of English in respondent's continuing education programme appropriate - Board reviewing approach to bargaining unit determinations - Unit based on subject-matter taught leading to undue fragmentation - Concerns for "self-determination" and "ease of organization" outweighed - Proposed unit held not appropriate
- TORONTO, BOARD OF EDUCATION FOR THE CITY OF; RE O.P.S.E.U.; RE ONTARIO SECONDARY SCHOOL TEACHERS' FEDERATION (June) 900
- Certification - Build-Up - Construction Industry - Employee - Reconsideration - Whether "Thirty-thirty" rule and build-up principle applied in construction industry certification applications - Whether Board should order hearing
- COLIBRI CONSTRUCTION INC.; RE LABOURERS' UNION, LOCAL 527 (July) 931
- Certification - Constitutional Law - Respondent hauling goods for manufacturer but not a licensed carrier nor involved in manufacturing itself - Respondent found to be delivery arm of manufacturer - Operation integral part of manufacturing concern and therefore within provincial jurisdiction
- FLEETWIDE, 608379 ONTARIO INC. O/A; RE TEAMSTERS UNION,
LOCAL 88..... (Sept.) 1216
- Certification - Constitutional Law - Whether labour relations of fishing boat crews within provincial or federal jurisdiction - Whether fishing falls within statutory exclusions of hunting and trapping - Board having jurisdiction to hear application on basis that labour relations in fisheries is within provincial jurisdiction
- GREAT LAKES FISHERMEN AND ALLIED WORKERS' UNION; RE OMSTEAD FOODS LIMITED ET AL.....(Dec.) 1691
- Certification - Construction Industry - Board not engaging in inquiry to review geographic boundaries of Board area #19 - Determination of trade when time split between labourer and operating engineer
- KLIMACK CONSTRUCTION LTD.; RE LABOURERS' UNION, LOCAL 491; RE GROUP OF EMPLOYEES (Sept.) 1238
- Certification - Construction Industry - Employee - Carpenters' Union making timely application - Employer not aware that sale provision binding him to Labourers' collective agreement -

Whether persons hired contrary to Labourers' agreement "employees" for purposes of Carpenters application - *April Waterproofing* principle considered

PIERRE A. GRATTON CONSTRUCTION INC., CONSTRUCTION P.H. GRAGER INC.; RE CARPENTERS UNION, LOCAL 93; RE LABOURERS UNION, LOCAL 527 (Jan.) 137

Certification - Construction Industry - Employee - Grievors laid-off before reporting to work on morning of the date of the application - Whether grievors should be included in count - Whether construction industry test "actually at work on date of application" satisfied

GALIL ELECTRIC COMPANY LIMITED; RE I.B.E.W., LOCAL 353 (July) 959

Certification - Construction Industry - Employer - Newsprint manufacturer using own work force to undertake construction project to improve quality of the newsprint - Whether employer operating a business in the construction industry

ABITIBI-PRICE INC.; RE U.A., LOCAL 628; RE LOCAL UNION 1565-I.B.E.W.; RE C.P.U., LOCALS 67, 40, 32, 109, 90, 132, 134, 133, 239, 249; RE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, THUNDER BAY LODGE 1120 (Dec.) 1613

Certification - Construction Industry - Employer - Subcontractor on project going bankrupt - General contractor paying subcontractor's employees in order to complete project - Subcontractor continuing to control project - General contractor becoming employer for purposes of certification application

ELLIS-DON LIMITED; RE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN & LOCAL UNION 7 CANADA (Aug.) 1076

Certification - Construction Industry - Membership Evidence - Practice and Procedure - Union seeking certification of employer's employees in ICI sector - Employer's submission that unit should be restricted to residential sector because employer principally operated in that sector and its employees were employed in that sector on application date, rejected - Allegation that dollar payment made conditionally not treated as non-pay - Board not conducting own investigation

WALLOY EXCAVATING COMPANY LIMITED; RE LABOURERS UNION, LOCAL 1059 (Apr.) 576

Certification - Construction Industry - Practice and Procedure - Board's rules requiring special form to be used where pre-hearing vote requested in construction certification application - Use of regular certification form technical defect - Application processed as if filed on proper form

McKAY-CROCKER CONSTRUCTION LIMITED; RE LABOURERS' UNION, LOCAL 1059 (Apr.) 517

Certification - Construction Industry - Practice and Procedure - Employer seeking after terminal date to amend reply to raise inclusion of person in unit - Allowed in circumstances - Count of employees in construction application determined as of application date - But representative period examined to determine craft employees engaged in

JIM BERTRAM & SONS CONSTRUCTION LTD.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; RE GROUP OF EMPLOYEES (Apr.) 511

Certification - Construction Industry - Practice and Procedure - Reply requesting a hearing to defend on grounds of *Charter of Rights and Freedoms* - Respondent failing to comply with

s.97 of Rules by failing to substantiate request for a hearing - Certification granted without a hearing

GLOBFIN DEVELOPMENTS LIMITED; RE LABOURERS' UNION,
LOCAL 183 (Nov.) 1514

Certification - Construction Industry - Practice and Procedure - Whether s.144(1) containing limitation on eligibility of an affiliated bargaining agent to bring certification application - Respondent's employees not entitled to notice of hearings once written representations not filed - Bulk of employees affected by application working in territorial jurisdiction of another union local - Board not required to give local notice of legal consequences of application

R. & H. ELECTRIC CO., 584317 ONTARIO LIMITED, C.O.B. AS, AND CONCEPT
ELECTRIC INC.; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, LOCAL 353 (Oct.) 1393

Certification - Dependent Contractor - Employee - Persons providing day-care services in own home under agreement with Creche - Day-care program funded by Federal, Provincial and Municipal governments - Board weighing economic dependence and control versus personal discretion exercised - Finding persons dependent contractors

CRADLESHIP CRECHE OF METROPOLITAN TORONTO; RE O.P.S.E.U.; RE
C.U.P.E. (Feb.) 225

Certification - Employee - Exhibits introduced by employer to show worker had access to confidential information - All confidential information whited out - Board unable to determine content of documents - Onus on party seeking exclusion of individuals from bargaining unit

DRG INC.; RE CANADIAN PAPERWORKERS UNION; RE GROUP OF
EMPLOYEES (Sept.) 1210

Certification - Employee - Practice and Procedure - Employer claiming all of its RNA's exercising managerial functions - Board drawing employer attention to relevant jurisprudence and requiring filing of written submissions as to basis of employer's position - Employer submissions not going beyond bald assertion that persons managerial - Board not making further inquiry into duties and responsibilities - Whether employer allowed to amend employee list after interim certificate issued upon waiver of hearings

GREEN GABLES MANOR INCORPORATED; RE SERVICE EMPLOYEES INTER-
NATIONAL UNION, LOCAL 204 (May) 626

Certification - Membership Evidence - Chief union organizer directing other organizers not to use two-tier initiation fee as organizing tool - Whether employees misled about effect of different initiation fees

TRIM TRENDS CANADA LTD.; RE UNITED STEELWORKERS OF AMERICA;
RE GROUP OF EMPLOYEES (Sept.) 1312

Certification - Membership Evidence - Irregularities in membership evidence disclosed by union in Form 9 declaration - Employer challenging secrecy of union membership evidence - Board reviewing purpose of Form 9 and policy of not allowing employer to inspect membership evidence

GRAND & TOY LIMITED; RE UNITED STEELWORKERS OF AMERICA; RE
GRAPHIC COMMUNICATIONS INTERNATIONAL UNION, LOCAL 500-M; RE
GROUP OF EMPLOYEES (Sept.) 1223

Certification - Membership Evidence - Practice and Procedure - Employee Collector using threats of loss of jobs in obtaining membership evidence - Membership evidence not given full

weight - Vote directed - Board Member critical of law permitting extensive employer participation in certification proceedings

AURORA STEEL SERVICE LIMITED; RE UNITED STEELWORKERS OF AMERICA; RE GROUP OF EMPLOYEES.....(Mar.) 301

Certification - Membership Evidence - Practice and Procedure - Original petition stolen prior to terminal date - Whether terminal date should be extended - Registered mail not including Priority Post - Respondent alleging in reply that union conduct in 1985 organizing campaign relevant to validity of membership evidence gathered in 1986 campaign - Petition taint theory cannot apply to membership evidence - Rule 71(1) applying to allegations made in a reply - Allegations in reply dismissed as irrelevant

WESTIN HOTEL; RE TEXTILE PROCESSORS, SERVICE TRADES, HEALTH CARE, TECHNICAL AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 351 (Oct.) 1486

Certification - Membership Evidence - Trade Union Status - Employees endorsing motion confirming constitution of association - Motion confirming membership only for those employees who supported motion and who had previously applied for membership - Applicant filing documents subsequent to terminal date on behalf of employees confirming membership - Documents not given any weight because signed subsequent to terminal date

VME EQUIPMENT OF CANADA LTD.; RE EMPLOYEES' ASSOCIATION OF EUCLID (V.M.E.)..... (Oct.) 1480

Certification - Petition - Board reviewing its jurisprudence in relation to petitions - Insufficient evidence to establish the voluntariness of the petitions - Board member setting out guidelines for valid petition

CUSTOM FOAM SPECIALITIES LIMITED; RE UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, AFL-CIO-CLC; RE GROUP OF EMPLOYEES (Dec.) 1680

Certification - Membership Evidence - Union's fee structure actually meeting Board's requirements re two-tier fees - Rank and file organizer misrepresenting nature of fee structure to employee who did not sign card - Whether one or all of cards collected by organizer rejected

DUNNVILLE, CORPORATION OF THE TOWN OF; RE U.F.C.W., LOCAL 175; RE C.U.P.E. (Jan.) 85

Certification - Petition - Documents indicating opposition to union filed after terminal date - Original petition stolen from company bulletin board - Board declining to exercise its discretion to extend terminal date

TWISTEX YARNS INC.; RE TEXTILE PROCESSORS, SERVICE TRADES, HEALTH CARE, PROFESSIONAL AND TECHNICAL EMPLOYEES INTERNATIONAL UNION, LOCAL 351; RE GROUP OF EMPLOYEES.....(Nov.) 1607

Certification - Petition - Employer supporting management employee's attempt to solicit objections to union - Advising employees of procedure for petitioning - Making available and collecting signed copies of petition for mailing - Petition not given weight - Certification procedure and treatment of petitions reviewed

CONFERENCE CUP CO. LTD.; RE LONDON AND DISTRICT SERVICE WORKERS' UNION, LOCAL 220; RE GROUP OF EMPLOYEES (Jan.) 72

Certification - Petition - Most senior employee - Working foreman preparing and circulating peti-

- tion in workplace - Employee perception of management involvement causing Board not to give weight to petition - Discussion of Board treatment of petitions
- CHATHAM CONCRETE FORMING, 407689 ONTARIO LIMITED C.O.B. AS; RE LABOURERS' UNION, LOCAL 625, RE GROUP OF EMPLOYEES (Apr.) 426
- Certification - Petition - Parties agreeing that individual not managerial - Rebuttable presumption that individual cannot affect voluntariness of others' conduct - Employer free to adduce evidence that individual affected conduct of persons supporting or opposing union
- PETRO-CANADA INC.; RE ENERGY AND CHEMICAL WORKERS UNION; RE GROUP OF EMPLOYEES (Apr.) 541
- Certification - Petitioners not represented by legal counsel - Inadequate evidence to establish voluntariness of petition - Lack of legal counsel not a mitigating factor
- SKELHORNS BUS LINE LIMITED; RE U.F.C.W.; RE GROUP OF EMPLOYEES (Oct.) 1435
- Certification - Petition - Practice and Procedure - Form 6 notice to employees indicating unit with exclusion of "manager and above" - Supervisor circulating petition - Union amending unit sought to exclude supervisors rendering petition involuntary - Board extending terminal date - Directing re-posting of new form 6 with amended unit and copy of decision
- WACKENHUT OF CANADA LIMITED, ALARM DIVISION; RE I.B.E.W., LOCAL 636; RE GROUP OF EMPLOYEES (Feb.) 292
- Certification - Petition - Two prominent members of public speaking out against organizing of company - Giving perception of link with employer - Making statements about loss of jobs resulting from unionization - Statements of third-parties vitiating petition in circumstances
- TRIM TRENDS CANADA LIMITED; RE UNITED STEELWORKERS OF AMERICA; RE GROUP OF EMPLOYEES (Mar.) 364
- Certification - Practice and Procedure - Dispute with respect to positions taken by parties at meeting with Board Officer - Board suggesting that officer should review report with parties and have parties sign it
- HARNDEN & KING CONSTRUCTION LTD.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; RE GROUP OF EMPLOYEES (Apr.) 507
- Certification - Practice and Procedure - Officer's memorandum noting parties' agreement on exclusion of person - Respondent's written submissions acknowledging accuracy of officer memo - Whether allowed to challenge accuracy six months later at Board hearing
- HARNDEN & KING CONSTRUCTION LTD.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; RE GROUP OF EMPLOYEES (May) 635
- Certification - Practice and Procedure - Pre-hearing Vote - Blank Form 9 not preventing Board from acting on appearance of membership evidence to direct pre-hearing vote - Board discussing its role in pre-hearing vote applications
- F. CAUSARANO FISHERY LTD.; RE GREAT LAKES FISHERMEN AND ALLIED WORKERS' UNION (Sept.) 1214
- Certification - Practice and Procedure - Pre-hearing Vote - Subsequent certification application filed before terminal date fixed for first certification application - First applicant requesting

a pre-hearing vote while subsequent one not - Subsequent applicant permitted to amend application to request pre-hearing vote

KOEHRING CANADA, A UNIT OF AMCA INTERNATIONAL LTD.; RE C.A.W.;
RE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP
BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO-CLC, LODGE
#275; RE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE
WORKERS(Nov.) 1530

Certification - Practice and Procedure - Reconsideration - Employer requesting Board reconsider its direction that employer provide copies of its employee lists to the union prior to the next hearing date - Whether labour relations officer need be present when union examines list

METROPOLITAN SEPARATE SCHOOL BOARD; RE C.U.P.E.; RE O.P.S.E.U.; RE
O.E.C.T.A.(Dec.) 1733

Certification - Practice and Procedure - Related Employer - Parties to certification proceedings making joint request for related employer declaration - Affected employees entitled to notice and opportunity to be heard - Hearing unnecessary unless employees make statement of desire to make representations

ST. JOSEPH'S HOME AND ST. JOSEPH'S HOSPITAL; RE C.U.P.E.(June) 880

Certification - Practice and Procedure - Representation Vote - Board requiring filing of fresh Form 9 declaration when membership evidence transferred from one certification application to another - Failure to file Form 9 does not prevent Board acting on "appearance" created by applications for membership cards and receipts - Failure only fatal when application comes on for hearing - Appropriateness of conducting mail ballot in occasional teachers' constituency

HALTON ROMAN CATHOLIC SEPARATE SCHOOL BOARD; RE ONTARIO
CATHOLIC OCCASIONAL TEACHERS' ASSOCIATION(July) 962

Certification - Practice and Procedure - Representation Vote - Form 9 signed "for" declarant by another individual - Whether acceptable - Proper Form 9 required to be filed at time Board determines membership support - Only appearance of support required to direct pre-hearing vote - Proper Form 9 can be filed after vote

NORTHRIDGE PLASTICS LIMITED; RE CANADIAN BROTHERHOOD OF RAIL-
WAY, TRANSPORT & GENERAL WORKERS(July) 1012

Certification - Practice and Procedure - Representation Vote - Individuals in voting constituency widely dispersed - Important that union able to communicate with voters - Employer directed to provide names and addresses to union and Board - *York Board of Education* principles followed

SCARBOROUGH BOARD OF EDUCATION; RE ONTARIO PUBLIC SCHOOL
TEACHERS' FEDERATION(Mar.) 361

Certification - Practice and Procedure - Representation Vote - Parties to pre-hearing application agreeing to exclude "all those paid from other than operating funds" - Board questioning appropriateness of exclusion - Permitting persons to cast segregated ballots pending determination of unit after vote

OTTAWA, UNIVERSITY OF; RE CANADIAN UNION OF EDUCATIONAL
WORKERS; RE THE ASSOCIATION OF PROFESSORS OF THE UNIVERSITY OF
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Certification - Practice and Procedure - Representation Vote - Request by applicant that name be amended on certification application from Textile Workers to Laundry and Linen Workers - Request granted but representation vote ordered despite fact that membership evidence

- over fifty-five percent - Board canvassing instances when discretion exercised under s.7(2) to order vote
- GRUYICH SERVICES INC., A LIMITED PARTNERSHIP AND 656508 ONTARIO LIMITED; RE LAUNDRY AND LINEN DRIVERS AND INDUSTRIAL WORKERS UNION, LOCAL 847 AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; RE GROUP OF EMPLOYEES.....(Aug.) 1092
- Certification - Practice and Procedure - Second union filing application for certification by intervention before terminal date of first union's application - Whether affected employees entitled to notice of intervention application
- STARWAYS DISTRIBUTORS, A DIVISION OF HARLEQUIN ENTERPRISES LIMITED; RE TORONTO TYPOGRAPHICAL UNION, NO. 91; RE THE SOUTHERN ONTARIO NEWSPAPER GUILD, LOCAL 87, NEWSPAPER GUILD(Apr.) 561
- Certification - Practice and Procedure - Union discovering change of heart by supporters - Requesting dismissal of certification application at commencement of hearing - Employer alleging non-pay and improper conduct in soliciting membership - Seeking inquiry and imposition of bar if allegations established - Employer request denied in circumstances
- QUICK MESSENGER SERVICE, A DIVISION OF 382525 ONTARIO LIMITED; RE RETAIL, WHOLESALE AND DEPARTMENT STORE UNION(Jan.) 145
- Certification - Practice and Procedure - Whether adequate notice of certification application - Whether Sunday regarded as day of notice - No employees making representations of inadequate notice - Whether terminal date extended solely at employer's request
- CUSTOM PHARMACEUTICALS LTD.; RE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS.....(Mar.) 315
- Certification - Reconsideration - Employer not posting Board notice and not filing reply to construction certification application - Not entitled to seek reconsideration of certificates issued on grounds of lack of adequate notice to employees because of its own failure to post - Hearing convened to hear employee objections to certification
- BRANTCO CONSTRUCTION; RE LABOURERS UNION, LOCAL 1059.....(Jan.) 3
- Certification - Representation Vote - Pre-hearing vote ordered in a constituency of occasional teachers - Whether vote should be conducted by mail
- OTTAWA CATHOLIC SEPARATE SCHOOL BOARD; RE ONTARIO CATHOLIC OCCASIONAL TEACHERS' ASSOCIATION(July) 1017
- Certification - Settlement - Settlement concerning status of disputed individuals not signed by objecting employees who had intervener status - Fact that objecting employees not examined by Labour Relations Officer not rendering settlement void - Final certificate revoked pending Officer meeting with employees
- WINCHESTER DISTRICT MEMORIAL HOSPITAL; RE O.N.A.; RE GROUP OF EMPLOYEES(Sept.) 1323
- Certification - Trade Union Status - Detailed analysis of steps taken to form a union - Union constitution permitting vessel owners to join union - Trade union need not be composed exclusively of employees - Applicant found to be trade union within meaning of s.1(1)(p)
- ETNA FOODS OF WINDSOR LIMITED; RE GREAT LAKES FISHERMEN AND ALLIED WORKERS' UNION; RE KINGVILLE FISHERMEN'S COMPANY LTD.; RE U.F.C.W.; RE LAKE ERIE FOODS INC.; RE GROUP OF EMPLOYEES; RE NORTHSORE FISHERY INC.(June) 710

- Certification - Trade Union Status - Union Successor Status - Whether merger of two international unions causing local to lose its status as a trade union - Applicant not entitled to presumption of status unless name identical with name used in previous proceeding - Use of name other than legal name not fatal to proof of status
- HARTLEY GIBSON COMPANY LIMITED; RE TORONTO PRINTING PRESSMEN & ASSISTANTS' UNION LOCAL 10, SUBORDINATE TO G.C.I.U.(Nov.) 1517
- Certification - Trade Union - Trade Union Status - Whether principals exercising managerial functions - Whether admission of persons exercising managerial functions depriving union of status - Whether occasional teachers eligible to become members - Whether sexual discrimination precluding certification - Whether Ontario Public School Teachers' Federation having trade union status
- WINDSOR, THE BOARD OF EDUCATION FOR THE CITY OF; RE ONTARIO PUBLIC SCHOOL TEACHERS' FEDERATION(Mar.) 378
- Certification - Unfair Labour Practice - Applicant requesting s.8 certification for full-time bargaining unit after lost representation vote - Settlement reached on s.89 complaint - Board concluding first vote influenced by unfair labour practices - Whether new vote should be ordered or applicant certified outright - Whether true wishes likely to be ascertained in representation vote - Settlement not enough to "restore the atmosphere" - Board exercising discretion to certify pursuant to s.8
- MAPLEHURST HOSPITAL LIMITED; RE C.L.A.C.; RE GROUP OF EMPLOYEES(July) 996
- Certification Where Act Contravened - Bargaining Rights - Collective Agreement - Interference in Trade Unions - Unfair Labour Practice - Rubber plant moving from Quebec to Ontario without advance notice to union - Quebec employees terminated and not re-hired at new location - Whether plant relocation and hiring practices tainted by anti-union motive - Whether bargaining rights having extra-territorial effect - Whether collective agreement binding outside Quebec
- SERVAAS RUBBER COMPANY INC.; RE LE SYNDICAT DES EMPLOYES DE SER VAAS (CSN); RE R.W.D.S.U.; RE LA COMPAGNIE DE CAOUTCHOUC SERVAAS INC. AND REAL LAUZON(Dec.) 1780
- Certification Where Act Contravened - Discharge for Union Activity - Unfair Labour Practice - Employees discharged during organizing campaign - Whether anti-union animus - Whether conditions for certification without vote satisfied
- MOREWOOD INDUSTRIES LIMITED; RE CARPENTERS UNION, GENERAL WORKERS LOCAL 1030(Mar.) 346
- Certification Where Act Contravened - Interference in Trade Unions - Unfair Labour Practices - Staff reduction "experiment" imposed by employer - Staff meetings held to explain effects of unionization - Respondent going beyond freedom of expression reserved to employer - Staff reductions linked to unionization - Union certified under s.8
- AURORA RESTHAVEN EXTENDED CARE & CONVALESCENT CENTRE, CEBY MANAGEMENT LIMITED OPERATING AS; RE C.L.A.C.; RE GROUP OF EMPLOYEES(Aug.) 1031
- Certification Where Act Contravened - Practice and Procedure - Union seeking certification without vote based on employer unlawful conduct - Employer accepting facts alleged and agreeing contraventions will likely result in true employee wishes not being ascertained in vote - Board finding adequate support for union - Certifying union under section 8
- BEST FORM BRASSIERE CANADA INC.; RE TEAMSTERS UNION, LOCAL 91(Jan.) 1

- Change in Working Conditions - Duty to Bargain in Good Faith - Interference in Trade Unions - Remedies - Unfair Labour Practice - Employer refusing to provide information or bargain about existing or proposed salaries - Whether union by-passed in communications with employees - Whether insisting on employee authorization to release salary information unlawful - Whether Board barring individual responsible for violations from participation in negotiations - Whether referring dispute to interest arbitration - Damages awarded for breach of bargaining duty - Employer directed to provide copy of Board decision to each employee
- FORINTEK CANADA CORP. AND JACQUES CARETTE; RE PUBLIC SERVICE ALLIANCE OF CANADA (Apr.) 453
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- ETOBICOKE GENERAL HOSPITAL; RE ASSOCIATION OF ALLIED HEALTH PROFESSIONALS, ONTARIO (May) 614
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- KIDD CREEK MINES LTD.; RE I.B.E.W., LOCAL 1687; RE UNITED STEELWORKERS OF AMERICA..... (June) 736
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EGAN VISUAL INC.; RE DANIEL BOWYER; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2679(Aug.) 1075

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DOMINION PAVING LIMITED; RE LABOURERS' UNION, LOCAL 183 AND INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 793 AND AMALGAMATED TRANSIT UNION, LOCAL 113 AND MICHAEL REILLY ET AL. (July) 946

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- PPG INDUSTRIES CANADA LTD., LONDON MERCHANDIZING BRANCH; RE ENERGY AND CHEMICAL WORKERS UNION (Jan.) 143
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- VINCENT SPIRITO & SONS LTD.; RE THE ONTARIO PROVINCIAL CONFERENCE OF THE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN (Feb.) 288
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- ROBERT B. SOMERVILLE COMPANY LIMITED; RE U.A., LOCAL 46 (Dec.) 1773
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- GREAT ATLANTIC AND PACIFIC TEA COMPANY OF CANADA LIMITED, RETAIL, WHOLESALE & DEPARTMENT STORE UNION, LOCAL 414; RE JAMES MEIKLE ET AL.; RE EDWARD JENNER AND JOHN YUILL; RE DOMINION STORES LIMITED; AND TWO OTHER FILES (Apr.) 485
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- SEARS CANADA INC.; RE EMPLOYEES OF SEARS CANADA INC. (PETERBOROUGH); RE RETAIL, WHOLESALE & DEPARTMENT STORE UNION (Aug.) 1159
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KIDD CREEK MINES LTD.; RE I.B.E.W., LOCAL 1687; RE UNITED STEEL-
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Constitutional Law - Certification - Respondent hauling goods for manufacturer but not a licensed carrier nor involved in manufacturing itself - Respondent found to be delivery arm of manufacturer - Operation integral part of manufacturing concern and therefore within provincial jurisdiction

FLEETWIDE, 608379 ONTARIO INC. O/A; RE TEAMSTERS UNION,
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Constitutional Law - Certification - Whether labour relations of fishing boat crews within provincial or federal jurisdiction - Whether fishing falls within statutory exclusions of hunting and trapping - Board having jurisdiction to hear application on basis that labour relations in fisheries is within provincial jurisdiction

GREAT LAKES FISHERMEN AND ALLIED WORKERS' UNION; RE OMSTEAD
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F.D.V. CONSTRUCTION LIMITED ET AL; RE I.B.E.W., LOCAL 1687 (May) 617

Constitutional Law - Company engaged in business of setting up and marketing air and rail tour packages - Tours sold on a wholesale basis to Ontario and U.S. travel agents - Some tours leave from U.S. to destinations in Ontario and outside Ontario - Business requiring some employees to travel outside Ontario on regular basis - Out-of-province services provided by persons other than employees of company - Whether business integral part of federal work or undertaking - Whether itself an "extra-provincial" work or undertaking - Whether "connecting" or "extending" beyond the province

KEYTOURS INC.; RE SERVICE EMPLOYEES UNION, LOCAL 210; RE GROUP
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Constitutional Law - Employees of uranium mine filing complaint - Operation within federal jurisdiction - Complaint dismissed

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- Constitutional Law - Practice and Procedure - Stay requested while courts decide constitutional question of jurisdiction - Union also requesting notice be given to Attorneys General of Board proceedings - Board having duty to rule upon constitutional challenge to assist courts in event of a judicial review - Notice to Attorneys General not required in this division of powers challenge
- C.P. FISHERIES LTD., ET AL.; RE GREAT LAKES FISHERMEN AND ALLIED WORKERS' UNION(Nov.) 1503
- Constitutional Law - Practice and Procedure - Termination - Certification for employees of employer engaged in truck hauling business obtained by waiver of hearings - Constitutional issue not raised or considered at certification - Board faced with termination application finding employer within federal jurisdiction - No jurisdiction to entertain termination application - Reconsideration application appropriate means to raise constitutionality of certificates issued
- BILL THOMPSON TRANSPORT LIMITED; RE ALLAN BERDAN ET AL.; RE CANADIAN BROTHERHOOD RAILWAY, TRANSPORT AND GENERAL WORKERS(Jan.) 2
- Construction Industry - Adjournment - Certification - Petition - Practice and Procedure - Statement of desire filed with no return mailing address of representative of employees - Acknowledgment of statement sent to first employee on list - No notice of hearing issued by Board in Form 79 - Representative of employees granted adjournment to retain counsel due to inadequate notice of hearing
- ELGIN CONSTRUCTION COMPANY LIMITED; RE LABOURERS' UNION, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE GROUP OF EMPLOYEES(July) 951
- Construction Industry - Arbitration - Practice and Procedure - Union not directly affected by arbitration proceeding seeking participation at hearing - Possible effect of Board award as precedent not reason to allow participation by stranger to proceedings
- TORONTO, THE MUNICIPALITY OF METROPOLITAN; RE I.B.E.W. LOCAL 353; RE THE ELECTRICAL TRADE BARGAINING AGENCY OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO(Apr.) 574
- Construction Industry - Bargaining Rights - Whether certificate of accreditation and subsequent operation of province-wide bargaining provisions of Act had effect of binding employer to current province-wide agreement
- JOHN HAYMAN & SONS COMPANY LIMITED AND ONTARIO AND KING LIMITED; RE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS, LOCAL 700(Apr.) 573
- Construction Industry - Bargaining Rights - Reconsideration - Whether certificate of accreditation and subsequent operation of province-wide bargaining provisions of Act had effect of binding employer to current province-wide agreement
- JOHN HAYMAN & SONS COMPANY, LIMITED, AND ONTARIO AND KING LIMITED; RE IRONWORKERS' UNION, LOCAL 700(Nov.) 1525
- Construction Industry - Bargaining Unit - Certification - Applicant seeking certification in two Board geographic areas while employees only existing in one - Geographic area in which no employees were employed as of the application date is not an appropriate geographic area within the meaning of s. 144(1)
- E/E FRADEMA MASONRY; RE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN, LOCAL 7 CANADA(Dec.) 1685

- Construction Industry - Bargaining Unit - Certification - Certification sought for a single all employee bargaining unit to include both employees engaged in construction work away from the employer's premises as well as employees engaged in non-construction work at employer's factory - Separate construction and non-construction units appropriate because there is no common work force
- METRO RAILING LTD.; RE CARPENTERS' UNION, LOCAL 27(Dec.) 1731
- Construction Industry - Bargaining Unit - Certification - Practice and Procedure - Whether trade unions other than applicant and intervener should have been given notices of the application and hearing - Issue depending on whether applicant is an affiliated bargaining agent - Whether applicant required to represent all trades employed by the respondent on the application date if the applicant is not an affiliated bargaining agent
- PROJECTA ENGINEERING AND CONSTRUCTION INC.; RE LUMBER AND SAWMILL WORKERS UNION, LOCAL 2693 OF THE CARPENTERS' UNION; RE LABOURERS' UNION, LOCAL 607; RE ONTARIO PROVINCIAL CONFERENCE OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE CENCAN CONCRETE & TILE LIMITED.....(Dec.) 1767
- Construction Industry - Bargaining Unit - Certification - Respondent requesting that "gas fitters" be referred to in bargaining unit description - Designation orders not explicitly referring to gas fitters - Board declining to describe a bargaining unit so as to give an affiliated bargaining agent the right to represent employees in trades other than those covered in the designation orders - Not necessary to determine whether gas fitting part of plumbing and steamfitting trades
- SUPERIOR PLUMBING & HEATING COMPANY LTD.; RE U.A., LOCAL 46, RE GROUP OF EMPLOYEES(Nov.) 1589
- Construction Industry - Bargaining Unit - Certification - Whether employees engaged in sheet metal work but not journeymen sheet metal workers or registered sheet metal apprentices should be included in bargaining unit - Board declining to reconsider its practice of excluding such employees as enunciated in *Irvcon Roofing*
- NAYLOR GROUP INCORPORATED; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION LOCAL UNION 537; RE GROUP OF EMPLOYEES ..(Nov.) 1559
- Construction Industry - Bargaining Unit - Termination - No collective agreement covering non-ICI projects and no work performed by employees in ICI sector - Whether applicants can seek termination of bargaining rights for both the ICI and non-ICI sectors - Whether employees working in only one unit can terminate bargaining rights in other one - Effect of statutory scheme imposing province-wide bargaining in ICI sector
- FRED JANTZ MASONRY CONSTRUCTION COMPANY LIMITED; RE MICHAEL C. SZABO ET AL.; RE ONTARIO PROVINCIAL CONFERENCE OF THE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN AND THE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN, LOCAL 23.....(Aug.) 1083
- Construction Industry - Bargaining Unit - Whether disputed employees "registered" sheet metal apprentices pursuant to *Apprenticeship and Tradesmen's Qualification Act* - Filing of contract of apprenticeship with Director of Apprenticeship minimum condition for determination
- NAYLOR GROUP INCORPORATED; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION LOCAL UNION 537; RE GROUP OF EMPLOYEES ..(Nov.) 1563
- Construction Industry - Build-up - Two contracts in hand and third contract expected increasing

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COLIBRI CONSTRUCTION INC.; RE LABOURERS' UNION, LOCAL 527 (May) 594
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Construction Industry Grievance - Practice and Procedure - Applicant union closing case in chief without calling evidence - Respondent making motion for nonsuit for failure to prove unemployed members available to perform improperly subcontracted work - Motion denied - Missing element only relevant to remedy and remedy yet to be considered by Board

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Construction Industry Grievance - Practice and Procedure - Whether applicant required to prove delivery of grievance to respondent before referral to Board - Whether failure to deliver mere technical defect - Whether applicant required to go through grievance procedure in collective agreement before referral under s. 124 - Whether delay in making referral reason to refuse entertaining grievance

ARLINGTON CRANE SERVICE LIMITED; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 (Apr.) 417

Construction Industry Grievance - Practice and Procedure - Whether rule permitting addition of parties applicable in s. 124 proceedings - Third party having contractual or proprietary rights under contract with employer - Whether having status to intervene as party as of right - Board having discretion to grant status - Discretion not exercised in circumstances

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Construction Industry Grievance - Practice and Procedure - Witness - Refusal by president of respondent to comply with Board direction to answer specific questions - Powers of Board to punish for contempt in face of the Board

RINO ZANETTE (1981) LTD.; RE LABOURERS' UNION, LOCAL 607 (Nov.) 1572

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STATE CONTRACTORS INC.; RE I.B.E.W. LOCAL 120 (Jan.) 158

Construction Industry Grievance - Whether provisions of province-wide collective agreement apply to specific area of province - Whether master agreement applies when no local schedule mandatorily applies - Where language in collective agreement permits, geographic jurisdiction assigned to individual locals corresponding to jurisdiction local enjoyed prior to province-wide bargaining - Extrinsic evidence admissible re actual jurisdiction

M. SULLIVAN AND SON; RE LABOURERS' UNION, LOCAL 247 (Aug.) 1110

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MINISTRY OF NATURAL RESOURCES, DANIEL DOLAN, HENRY WILSON AND THE CROWN IN THE RIGHT OF ONTARIO AS REPRESENTED BY; RE O.P.S.E.U. (Mar.) 331

Damages - Construction Industry - Construction Industry Grievance - Whether work repair or maintenance - Whether construction - Maintenance agreement cannot apply to ICI work because of s. 146(2) - Whether union estopped from claiming damages because of past practice of applying maintenance agreement - Whether damages denied because of delay

INSCAN CONTRACTORS (ONTARIO) INC.; RE INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS & ASBESTOS WORKERS AND ITS LOCAL 95 (May) 640

Damages - Construction Industry Grievance - Union referring member returning from inquiry and Workers Compensation - Whether denial of employment violation of agreement - Whether employer entitled to seek further medical evidence - Whether duty of mitigation requiring acceptance of modified work

E. S. FOX LTD., ONTARIO SHEET METAL AND AIRHANDLING GROUP; RE ONTARIO SHEET METAL WORKERS CONFERENCE, SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 269 (Apr.) 438

Damages - Construction Industry Grievance - Whether genuine sub-contract or attempt to avoid collective agreement - Board considering employer's good faith in making sub-contract arrangement and union's knowledge - Refusing to go behind "sub-contract" in particular circumstances - Damages assessed for hours lost by union members

STEVE'S SHEET METAL CO., S.N. VENTILATION HEATING LIMITED, C.O.B. AS; RE SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 537 (Sept.) 1309

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BECKETT ELEVATOR LIMITED; RE INTERNATIONAL UNION OF ELEVATOR CONTRACTORS, LOCAL 50(Nov.) 1493

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K & U MANUFACTURING LIMITED; RE UNITED STEELWORKERS OF AMERICA; RE GROUP OF EMPLOYEES.....(Jan.) 115

Discharge for Union Activity - Intimidation and Coercion - Unfair Labour Practice - Whether right to resort to grievance procedure and arbitration right protected under Act - Employer

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Discharge for Union Activity - Remedies - Unfair Labour Practice - Pattern of anti-union conduct aimed at union supporters - Unfair labour practice complaints settled but complainant harassed and discharged a second time - Breach of ss. 64, 66 and two settlements which included a no reprisal clause - Remedies including reinstatement with full wages, posting, and order that employer provide copy of decision to all employees

JACMORR MANUFACTURING LIMITED; RE U.F.C.W.(Dec.)

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Discharge for Union Activity - Unfair Labour Practice - Chief union organizer discharged on day of certification hearing - Organizer terminated solely for his threatening behaviour and racist remarks - Complaint dismissed

OLYMPIA FLOOR & WALL TILE CO., OLYMPIA & YORK DEVELOPMENTS LIMITED C.O.B. AS, AND JOE SCHOCHET; RE LABOURERS' UNION, LOCAL 183(Dec.)

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Duty of Fair Referral - Unfair Labour Practice - "Two-job" rule in hiring hall applied to complainant but not travellers - Whether systemic discrimination breach of s. 69 - Cogent labour relations purpose test applied prior to finding of discrimination

LAWRENCE, RON; RE U.E., LOCAL 120 (Sept.)

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Duty of Fair Referral - Unfair Labour Practice - Union adopting policy of refusing name hires following pre-job conference - Depriving complainant of job opportunities - Whether union action arbitrary, discriminatory or in bad faith

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both groups having conflict of interest - Whether process followed or terms of agreement accepted constituting unfair representation of Dominion employees

GREAT ATLANTIC AND PACIFIC TEA COMPANY OF CANADA LIMITED, RETAIL, WHOLESALE & DEPARTMENT STORE UNION, LOCAL 414; RE JAMES MEIKLE ET AL; RE EDWARD JENNER AND JOHN YUILL; RE DOMINION STORES LIMITED; AND TWO OTHER FILES(Apr.) 485

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- ST. PIERRE, JEANNE; RE U.A.W., LOCAL 444 AND CHRYSLER CANADA LTD. (June) 883
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- MEDEIROS, TONY AND JOE DACOSTA, RE; RE C.U.P.E., LOCAL 1479; RE FRONTENAC-LENNOX & ADDINGTON COUNTY ROMAN CATHOLIC SEPARATE SCHOOL BOARD..... (Nov.) 1541
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AURORA RESTHAVEN EXTENDED CARE & CONVALESCENT CENTRE, CEBY MANAGEMENT LIMITED OPERATING AS; RE C.L.A.C.; RE GROUP OF EMPLOYEES (Aug.) 1031

Interference in Trade Unions - Change in Working Conditions - Duty to Bargain in Good Faith - Remedies - Unfair Labour Practice - Employer refusing to provide information or bargain about existing or proposed salaries - Whether bad faith bargaining - Whether unilateral implementation of salary adjustments freeze violation - Whether union bypassed in communications with employees - Whether insisting on employee authorization to release salary information unlawful - Whether Board barring individual responsible for violations from participation in negotiations - Whether referring dispute to interest arbitration - Damages awarded for breach of bargaining duty - Employer directed to provide copy of Board decision to each employee

FORINTEK CANADA CORP. AND JACQUES CARETTE; RE PUBLIC SERVICE ALLIANCE OF CANADA (Apr.) 453

Interference in Trade Unions - Charter of Rights and Freedoms - Duty to Bargain in Good Faith - Strike - Unfair Labour Practice - Employer taking position in bargaining that striking employees would only be recalled to work in order of seniority as vacancies arose - Employer's preference for maintaining strike replacements discriminating against striking employees - Violation of ss.15, 64 and 66 - Employer having right to raise objection to reverse onus provision in Act as being contrary to s.15 of Charter - Distinction in reverse onus provision between employers and individuals who are not employers not contrary to s.15 of Charter

SHAW-ALMEX INDUSTRIES LIMITED; RE UNITED STEELWORKERS OF AMERICA; RE GROUP OF EMPLOYEES (Dec.) 1800

Interference in Trade Unions - Charter of Rights and Freedoms - Related Employer - Sale of a Business - Unfair Labour Practice - Whether reverse onus in s.89(5) contrary to presumption of innocence in Charter - Dominion store chain changing to Mr. Grocer franchise operation - Character of business not changed to cause Board to terminate bargaining rights under s.63(5) - Difficulties in applying collective agreement not reason to terminate -

Whether related employer declaration made - Decision to franchise not tainted - Hiring of employees without regard to seniority and recall rights in collective agreement unlawful

RPKC HOLDING CORPORATION; RE RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, LOCAL 414; RE DOMINION STORES LIMITED; RE WIL-LETT FOODS LIMITED (June)

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Interference in Trade Unions - Discharge for Union Activity - Employee - Remedies - Unfair Labour Practice - Lay-off of union supporters and promotion of union opponents motivated by anti-union reasons - Captive audience meeting unlawful - Board considering probability of lay-off for business reasons in computing compensation - Directing posting and mailing of employee notice and permission for union to conduct employee meeting during work hours - Whether working foremen managerial or confidential

K & U MANUFACTURING LIMITED; RE UNITED STEELWORKERS OF AMERICA; RE GROUP OF EMPLOYEES.....(Jan.)

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Interference in Trade Unions - Duty to Bargain in Good Faith - Related Employer - Remedies - Unfair Labour Practice - Nursing home contracting with outside agencies to perform house-keeping, laundry, maintenance, health care and nursing aide functions - Laying-off own employees - Whether unlawful - Whether home and outside agencies related employers - Whether bound by collective agreement - Whether control reserved by written contract relevant though not exercised - Reinstatement and back wages directed as remedy on related employer declaration - Failure to bargain with negotiating committee because of its composition unlawful

BRANTWOOD MANOR NURSING HOMES LIMITED, MED+EXPERTS INC., HALLMARK HOUSEKEEPING SERVICES INC. ET AL; RE C.U.P.E.(Jan.)

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Interference in Trade Unions - Unfair Labour Practice - Right to representation at time of formal discipline included in section 64 - Right only where grievor required to meet with employer for purposes of imposing discipline - Act not turning directory provision for discipline meeting into mandatory - Act not intended to provide appeal to Board from arbitration award upholding discharge - *Windsor Western Hospital* distinguished

SUNWORTHY WALLCOVERINGS, A DIVISION OF BORDEN COMPANY LIMITED; RE CANADIAN PAPERWORKERS UNION, LOCAL 304(Jan.)

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Intimidation and Coercion - Colleges Collective Bargaining Act - Unfair Labour Practice - Cancellation of courses taught by full-time faculty in extension program during legal strike not tainted by anti-union motive - Absence of reverse onus in CCBA

CAMBRIAN COLLEGE OF APPLIED ARTS AND TECHNOLOGY; RE O.P.S.E.U..... (Sept.)

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TORONTO, MUNICIPALITY OF METROPOLITAN, C.U.P.E., METROPOLITAN TORONTO CIVIC EMPLOYEES UNION, LOCAL 43; RE CANADIAN UNION OF OPERATING ENGINEERS AND GENERAL WORKERS, LOCAL 101 (Oct.)

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- Jurisdictional Dispute - Adjournment - Construction Industry Grievance - Practice and Procedure
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BURLINGTON NORTHERN AIR FREIGHT (CANADA) LTD.; RE TORONTO
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Lock-out - Health and Safety - Strike - City sanitation workers collectively refusing to wear safety vests - Work stoppage continuing for several days - Employee conduct constituting strike rather than *bona fide* refusal to work because of safety concerns - No remedial direction other than declaration of unlawful strike

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Lock-out - Strike - Employer eliminating extended shifts to circumvent economic burden resulting from interest arbitration award unless union prepared to waive benefit in award - No loss of hours or pay for employees - No "suspension of work" within meaning of lockout definition - Whether employee responses to shift elimination constituting "strike"

OTTAWA CIVIC HOSPITAL; RE DONNA HICKS, PRESIDENT, LOCAL 90 AND
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Membership Evidence - Allegation of non-pay dismissed where employee intended to pay back loan - Initial solicitation procedure involving drop-off of blank membership cards to be filled and mailed in by employees - First certification application withdrawn but refiled on same day - Fresh cards signed and collected by organizers - Whether membership evidence accepted as regular

NATIONAL TRUST; RE UNION OF BANK EMPLOYEES (ONTARIO), LOCAL
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Membership Evidence - Certification - Chief union organizer directing other organizers not to use two-tier initiation fee as organizing tool - Whether employees misled about effect of different initiation fees

TRIM TRENDS CANADA LTD.; RE UNITED STEELWORKERS OF AMERICA;
RE GROUP OF EMPLOYEES (Sept.)

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Membership Evidence - Certification - Construction Industry - Practice and Procedure - Union seeking certification of employer's employees in ICI sector - Employer's submission that unit should be restricted to residential sector because employer principally operates in that sector and its employees were employed in that sector on application date, rejected - Allegation that dollar payment made conditionally not treated as non-pay - Board not conducting own investigation

WALLOY EXCAVATING COMPANY LIMITED; RE LABOURERS UNION,
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Membership Evidence - Certification - Irregularities in membership evidence disclosed by union in Form 9 declaration - Employer challenging secrecy of union membership evidence -

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- Membership Evidence - Certification - Practice and Procedure - Employee collector using threats of loss of jobs in obtaining membership evidence - Membership evidence not given full weight - Vote directed - Board Member critical of law permitting extensive employer participation in certification proceedings
- AURORA STEEL SERVICE LIMITED; RE UNITED STEELWORKERS OF AMERICA; RE GROUP OF EMPLOYEES (Mar.) 301
- Membership Evidence - Certification - Practice and Procedure - Original petition stolen prior to terminal date - Whether terminal date should be extended - Registered mail not including Priority Post - Respondent alleging in reply that union conduct in 1985 organizing campaign relevant to validity of membership evidence gathered in 1986 campaign - Petition taint theory cannot apply to membership evidence - Rule 71(1) applying to allegations made in a reply - Allegations in reply dismissed as irrelevant
- WESTIN HOTEL; RE TEXTILE PROCESSORS, SERVICE TRADES, HEALTH CARE, TECHNICAL AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 351 (Oct.) 1486
- Membership Evidence - Certification - Trade Union Status - Employees endorsing motion confirming constitution of association - Motion confirming membership only for those employees who supported motion and who had previously applied for membership - Applicant filing documents subsequent to terminal date on behalf of employees confirming membership - Documents not given any weight because signed subsequent to terminal date
- VME EQUIPMENT OF CANADA LTD.; RE EMPLOYEES' ASSOCIATION OF EUCLID (V.M.E.) (Oct.) 1480
- Membership Evidence - Certification - Union's fee structure actually meeting Board's requirements re two-tier fees - Rank and file organizer misrepresenting nature of fee structure to employee who did not sign card - Whether one or all of cards collected by organizer rejected
- DUNNVILLE, CORPORATION OF THE TOWN OF, RE U.F.C.W., LOCAL 175; RE C.U.P.E. (Jan.) 85
- Membership Evidence - Collectors properly instructed on legal requirements in obtaining union membership - Form 9 declarant not intending to mislead Board but not aware of need to make inquiry from collectors - Board reviewing importance of proper inquiries to process - Application dismissed
- WESTINGHOUSE CANADA INC.; RE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; RE GROUP OF EMPLOYEES (Feb.) 295
- Membership Evidence - Picket line not having any unlawful consequences - Whether coerced employees into signing union cards - Whether cards vitiated - Subjective intentions of employees not considered in assessing voluntariness of membership evidence - Economic coercion not relevant - Confidentiality in s.111 preventing employer from calling employees to testify
- DOMINION PAVING LIMITED; RE LABOURERS' UNION, LOCAL 183 (June) 705
- Membership Evidence - Practice and Procedure - Two collectors collecting 80 percent of cards filed - Misleading Form 9 declarant about non-pay regarding two cards - Board not satisfied

any cards filed by collectors reliable - Fact that non-pay came to light due to unlawful conduct of employer irrelevant to issue of membership evidence	
DOUGH DELIGHT LTD.; RE BAKERY, CONFECTIONERY AND TOBACCO WORKERS INTERNATIONAL UNION, LOCAL 181 (May)	603
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ROWAD PIPELINE COMPANY LTD.; RE LABOURERS UNION, LOCAL 1081.....(Jan.)	148
Membership Evidence - Principal of employer advising employee of forthcoming visit by union rep - Urging employee to sign card - All cards filed not given weight in absence of evidence that incident isolated	
CONSBEC INC.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; RE LABOURERS' UNION, LOCAL 607 (July)	937
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ALLAN G. COOK LIMITED; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; RE GROUP OF EMPLOYEES (Sept.)	1175
Natural Justice - Practice and Procedure - Board member executive director of council that co-ordinates bargaining in the ICI sector of the construction industry - Propriety of co-ordinated collective bargaining as it affects bargaining in residential sector of construction industry significant issue in case - Whether Board member should be removed from panel - Whether reasonable apprehension of bias	
METROPOLITAN PLUMBING AND HEATING CONTRACTORS ASSOCIATION, A DIVISION OF THE MECHANICAL CONTRACTORS ASSOCIATION OF TORONTO, FRANK MICHELUCCI, ET AL.; RE SEAN O'RYAN, U.A., LOCAL 46, MECHANICAL PLUMBING CONTRACTORS ASSOCIATION, URBAN MECHANICAL CONTRACTORS LIMITED, ZENTIL PLUMBING AND HEATING CO. LTD., ET AL.(Aug.)	1104
Parties - Construction Industry Grievance - Whether local can bring grievance under s.124 when collective agreement between EPSCA and Allied Council - Distinction between being bound by a collective agreement and being a party to a collective agreement discussed	
ONTARIO HYDRO, ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE LABOURERS' UNION, LOCAL 1059.....(Aug.)	1137
Parties - Evidence - Practice and Procedure - Union having adequate notice of unfair labour practice complaint by employee against employer - Request at hearing to be added as party denied - Complainant witness refusing to deliver up to Board document tendered as evidence - Complainant's conduct precluding Board from proceeding further - Board proposing to dismiss complaint if document not surrendered	
DOUGH DELIGHT LTD.; RE ROBERT WILLIAMS (Oct.)	1333
Parties - Practice and Procedure - Service requirements in Practice Note 5 relaxed due to number	

of parties involved - Board practice for amending application or complaint to add a respondent set out

MR. GROCER, WILLETT FOODS LIMITED, C.O.B. AS, DOMGROUP LTD., HOLLINGER INC., CONRAD BLACK; RE R.W.D.S.U., LOCAL 414; RE TERMARG FOOD SERVICES LIMITED ET AL. (Sept.) 1276

Parties - Reconsideration - Related Employer - Unfair Labour Practice - Whether Conrad Black and Hollinger Inc. should be added as respondents in s.1(4) and 89 complaints - Earlier panel in *Termarg* denying addition - Whether Board will reconsider earlier decision - Board applying principle of *res judicata* - Whether those who actively control a corporate employer personally or vicariously liable - When Board will dismiss s.1(4) application before hearing respondent's evidence

MR. GROCER, WILLETT FOODS LIMITED, C.O.B. AS, DOMGROUP LTD., HOLLINGER INC., CONRAD BLACK, ET AL.; RE R.W.D.S.U., LOCAL 414; RE TERMARG FOOD SERVICES LIMITED ET AL. (Oct.) 1364

Parties - Unfair Labour Practice - Plant shutdown following filing of certification application - Employees laid off following certification - Statement to employees threatening shutdown - Breach of sections 64, 66 and 70 found - Order made against both company and president and sole shareholder personally

WALTER TOOL AND DIE LTD.; RE UNITED STEELWORKERS OF AMERICA; RE ERWIN WALTER (Aug.) 1167

Petition - Adjournment - Certification - Construction Industry - Practice and Procedure - Statement of desire filed with no return mailing address of representative of employees - Acknowledgment of statement sent to first employee on list - No notice of hearing issued by Board in Form 79 - Representative of employees granted adjournment to retain counsel due to inadequate notice of hearing

ELGIN CONSTRUCTION COMPANY LIMITED; RE LABOURERS' UNION, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE GROUP OF EMPLOYEES (July) 951

Petition - Adjournment - Evidence - Termination - Collector of petition signatures unable to attend hearing due to employer denying time off - Applicants producing note from collector indicating that signatures on petition voluntary - Note rejected as hearsay evidence - Applicants having obligation to ensure attendance of witnesses at hearing by issuing summons - Adjournment denied

PIONEER YOUTH SERVICES LTD.; RE LYSE LEBRUN, SAMUEL (DAVID) WATSON; RE LONDON AND DISTRICT SERVICE WORKERS' UNION LOCAL 220, SERVICE EMPLOYEES INTERNATIONAL UNION (Oct.) 1389

Petition - Certification - Board reviewing its jurisprudence in relation to petitions - Insufficient evidence to satisfy onus on the objecting employees to establish the voluntariness of the petitions - Board member setting out guidelines for valid petition

CUSTOM FOAM SPECIALITIES LIMITED; RE UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, AFL-CIO-CLC; RE GROUP OF EMPLOYEES (Dec.) 1680

Petition - Certification - Documents indicating opposition to union filed after terminal date - Original petition stolen from company bulletin board - Board declining to exercise its discretion to extend terminal date

TWISTEX YARNS INC.; RE TEXTILE PROCESSORS, SERVICE TRADES, HEALTH CARE, PROFESSIONAL AND TECHNICAL EMPLOYEES INTERNATIONAL UNION, LOCAL 351; RE GROUP OF EMPLOYEES (Nov.) 1607

- Petition - Certification - Employer supporting management employee's attempt to solicit objections to union - Advising employees of procedure for petitioning - Making available and collecting signed copies of petition for mailing - Petition not given weight - Certification procedure and treatment of petitions reviewed
- CONFERENCE CUP CO. LTD.; RE LONDON AND DISTRICT SERVICE WORKERS' UNION, LOCAL 220; RE GROUP OF EMPLOYEES(Jan.) 72
- Petition - Certification - Most senior employee-working foreman preparing and circulating petition in workplace - Employee perception of management involvement causing Board not to give weight to petition - Discussion of Board treatment of petitions
- CHATHAM CONCRETE FORMING, 407689 ONTARIO LIMITED C.O.B. AS; RE LABOURERS' UNION, LOCAL 625, RE GROUP OF EMPLOYEES(Apr.) 426
- Petition - Certification - Parties agreeing that individual not managerial - Rebuttable presumption that individual cannot affect voluntariness of others' conduct - Employer free to adduce evidence that individual affected conduct of persons supporting or opposing union
- PETRO-CANADA INC.; RE ENERGY AND CHEMICAL WORKERS UNION; RE GROUP OF EMPLOYEES(Apr.) 541
- Petition - Certification - Petitioners not represented by legal counsel - Inadequate evidence to establish voluntariness of petition - Lack of legal counsel not a mitigating factor
- SKELHORNS BUS LINE LIMITED; RE U.F.C.W.; RE GROUP OF EMPLOYEES (Oct.) 1435
- Petition - Certification - Practice and Procedure - Form 6 notice to employees indicating unit with exclusion of "manager and above" - Supervisor circulating petition - Union amending unit sought to exclude supervisors rendering petition involuntary - Board setting new terminal date - Directing re-posting of new Form 6 with amended unit and copy of decision
- WACKENHUT OF CANADA LIMITED, ALARM DIVISION; RE I.B.E.W., LOCAL 636; RE GROUP OF EMPLOYEES..... (Feb.) 292
- Petition - Certification - Two prominent members of public speaking out against organizing of company - Giving perception of link with employer - Making statements about loss of jobs resulting from unionization - Statements of third-parties vitiating petition in circumstances
- TRIM TRENDS CANADA LIMITED; RE UNITED STEELWORKERS OF AMERICA; RE GROUP OF EMPLOYEES.....(Mar.) 364
- Petition - Practice and Procedure - Termination - Evidence before Board that termination petition not voluntary - Inquiry into voluntariness of counter-petition rendered irrelevant - Termination application dismissed
- CANADIAN PACIFIC HOTELS LIMITED (RED OAK INN); RE MIKE TALES ET AL; RE HOTEL, RESTAURANT AND CAFETERIA EMPLOYEES UNION, LOCAL 75; RE GROUP OF EMPLOYEES (Feb.) 204
- Petition - Termination - Applicant collecting separate petitions from each of 44 employees - Arranging and copying 44 sheets into single document and mailing originals to union - Board accepting single document filed where union not refuting existence of 44 separate petitions
- YONGE- EGLINTON CENTRE MANAGEMENT SERVICES; RE BERYL WATTS; RE CANADIAN UNION OF OPERATING ENGINEERS & GENERAL WORKERS UNION, LOCAL 101(Jan.) 185

- Petition - Termination - Evidence led as to circulation and delivery of petition to Board - No evidence about origination and preparation - Petition rejected
- DYNASTY INN, 629809 ONTARIO LIMITED C.O.B. AS.; RE DOUG CHASE; RE HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, LOCAL 280, BEVERAGE DISPENSERS UNION(Mar.) 326
- Petition - Termination - Owner's wife part-time employee - Speaking at employees' meeting and signing petition - Wife's involvement suggesting management interest in petition - Reasonable fear of employees that management would know identity of those not signing - Board rejecting petition as involuntary
- GARDINER'S SUPERMARKET LIMITED; RE SERVICE EMPLOYEES UNION, LOCAL 183; RE OLGA YORK (June) 726
- Petition - Termination - Petition circulated by friend of member of management - Whether employee perception that petition will be disclosed to management - Whether existence of employee dissatisfaction with union relevant
- DOMUS BUILDING CLEANING CO. LTD.; RE THERESE LAFRAMBOISE AND YOLANDE PICHETTE; RE SERVICE EMPLOYEES UNION, LOCAL 219(Mar.) 319
- Petition - Termination - Signatures on petition consisting of first or last names only - Whether Rule 73 requiring signatures in full - Whether incomplete signatures indicating employees did not know what they were doing
- FERN BRAND WAXES LIMITED; RE THE EMPLOYEES OF FERN BRAND WAXES LTD.; RE INTERNATIONAL UNION OF ALLIED NOVELTY AND PRODUCTION WORKERS, LOCAL 905..... (Oct.) 133
- Petition - Termination - Whether events taking place months prior to actual origination and circulation of petition relevant to issue of voluntariness - Employer conduct not tainting petition
- BELLEVILLE PLAZA; RE CRAIG SCURR; RE SERVICE EMPLOYEES UNION, LOCAL 183; RE GROUP OF EMPLOYEES..... (Sept.) 1179
- Picketing - Charter of Rights and Freedoms - Strike - Union members refusing to cross picket line at Toronto Transit Commission job site - Whether *Transit Labour Disputes Act* violates s.2(d) of Charter - Constitutional challenge not entertained in absence of notice to Attorney General - Whether Board has jurisdiction to entertain s.89 complaint for alleged violation of *Transit Labour Disputes Act*
- DOMINION PAVING LIMITED; RE LABOURERS' UNION, LOCAL 183 AND INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 AND AMALGAMATED TRANSIT UNION, LOCAL 113 AND MICHAEL REILLY ET AL. (July) 946
- Practice and Procedure - Accreditation - Evidence - Whether present panel of Board will review 1973 decision of another panel to issue accreditation certificate - Whether evidence relating to conversations with a mediator admissible
- METROPOLITAN PLUMBING AND HEATING CONTRACTORS ASSOCIATION, FRANK MICHELUCCI, ET AL.; RE SEAN O'RYAN, U.A., LOCAL 46, METROPOLITAN PLUMBING CONTRACTORS ASSOCIATION, URBAN MECHANICAL CONTRACTORS LIMITED, ZENTIL PLUMBING AND HEATING CO. LTD., ET AL. (Sept.) 1252
- Practice and Procedure - Adjournment - Certification - Construction Industry - Petition - Statement of desire filed with no return mailing address of representative of employees - Acknowledgment of statement sent to first employee on list - No notice of hearing issued by

Board in Form 79 - Representative of employees granted adjournment to retain counsel due to inadequate notice of hearing

ELGIN CONSTRUCTION COMPANY LIMITED; RE LABOURERS' UNION, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE GROUP OF EMPLOYEES (July) 951

Practice and Procedure - Adjournment - Certification - Parties agreeing to an adjournment *sine die* pending the determination of certain test cases - Test cases not concluded by end of one year period of adjournment - Remaining certification applications scheduled for hearing

LINCOLN COUNTY BOARD OF EDUCATION; RE ONTARIO SECONDARY SCHOOL TEACHERS' FEDERATION (Nov.) 1539

Practice and Procedure - Adjournment - Construction Industry Grievance - Jurisdictional Dispute - Sector Determination - Whether Board should proceed with sector determination or defer to mediation efforts of Industrial Inquiry Commissioner

WEST YORK CONSTRUCTION LTD.; RE CARPENTERS' DISTRICT COUNCIL OF TORONTO AND VICINITY, ON BEHALF OF LOCALS 27 AND 1304, CARPENTERS' UNION; RE METROPOLITAN TORONTO APARTMENT BUILDERS' ASSOCIATION; RE LABOURERS' UNION, LOCAL 183; RE THE ONTARIO FORM WORK ASSOCIATION; RE THE FORM WORK COUNCIL OF ONTARIO (Nov.) 1610

Practice and Procedure - Adjournment - Termination - Several s.89 complaints pending before Board - Board declining to postpone consideration of timely termination application pending disposition of earlier complaints - Whether a prior defective statement of desire will taint one subsequently filed

NEPEAN ROOF TRUSS LTD.; RE FLOYED RYAN DESCHAMPS; RE CARPENTERS UNION, LOCAL 1030 (Sept.) 1279

Practice and Procedure - Adjournment - Unfair Labour Practice - Complaint relating to bargaining between employer and union - Employees only incidentally affected - Employees not entitled to notice - Request for adjournment to facilitate notice refused

MARKS LUMBER LTD.; RE INTERNATIONAL WOODWORKERS OF AMERICA (July) 1004

Practice and Procedure - Arbitration - Collective Agreement - Unfair Labour Practice - Foremen performing bargaining unit work - Union arguing violation of s.50 of the Act - Whether matter proper for Board consideration - Board finding matter to be one of contract application and interpretation classically dealt with by arbitrators - Board deferring matter to arbitration

LLOYD-TRUAX LIMITED WINGHAM; RE CARPENTERS UNION, LOCAL 3054 (July) 994

Practice and Procedure - Arbitration - Construction Industry Grievance - Timeliness - Grievor claiming retroactive room-and-board allowance - Grievance launched with considerable delay - Board applying equitable doctrine of *laches* - Grievance dismissed

ONTARIO HYDRO-DARLINGTON G.S. AND THE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL AND L.I.U.N.A., LOCAL 597 (July) 1014

Practice and Procedure - Arbitration - Construction Industry - Union not directly affected by

arbitration proceeding seeking participation at hearing - Possible effect of Board award as precedent not reason to allow participation by stranger to proceedings

TORONTO, THE MUNICIPALITY OF METROPOLITAN; RE I.B.E.W. LOCAL 353;
RE THE ELECTRICAL TRADE BARGAINING AGENCY OF THE ELECTRICAL
CONTRACTORS ASSOCIATION OF ONTARIO (Apr.) 574

Practice and Procedure - Arbitration - Employee Reference - Witness - Whether individual an
"employee" - Board not deferring to arbitration - Whether witness entitled during cross-ex-
amination to discuss with own counsel whether specific questions must be answered - Appli-
cability of Rules of Professional Conduct and *Statutory Powers Procedure Act*

REXWOOD PRODUCTS LIMITED; RE LUMBER AND SAWMILL WORKERS'
UNION, LOCAL 2995 OF THE UNITED BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA (Aug.) 1139

Practice and Procedure - Arbitration - Evidence - Motion to dismiss complaint without hearing
dismissed - Whether Board should defer to grievance arbitration - Board discussing ade-
quacy of particulars in complaints

GENERAL HOSPITAL OF PORT ARTHUR AND ONTARIO HOSPITAL ASSOCIA-
TION; RE O.N.A. (Sept.) 1218

Practice and Procedure - Arbitration - Interference in Trade Unions - Unfair Labour Practice -
Union requesting copies of master plan containing information on benefits provided by col-
lective agreements - Employer refusing copies but permitting review of copy in company
downtown office - Constituting interference - Not deferring to arbitration

FORD GLASS LIMITED; RE ALUMINUM BRICK AND GLASS WORKERS INTER-
NATIONAL UNION AND ITS LOCAL 295 G (May) 624

Practice and Procedure - Bargaining Unit - Build-Up - Certification - Whether students included
in part-time unit sought - Whether build-up justifying deferred vote direction - Interim cer-
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- BRANTCO CONSTRUCTION; RE LABOURERS UNION, LOCAL 1059.....(Jan.) 3
- Reconsideration - Certification - Practice and Procedure - Employer requesting Board reconsider its direction that employer provide copies of its employee lists to the union prior to the next hearing date - Whether labour relations officer need be present when union examines list
- METROPOLITAN SEPARATE SCHOOL BOARD; RE C.U.P.E.; RE O.P.S.E.U.; RE O.E.C.T.A.(Dec.) 1733
- Reconsideration - Employee Reference - Security Guard - Individuals claiming to be guards and seeking exclusion from all employee collective agreement - Whether entitled to apply under section 106(2) - Prohibition against Board certifying unit including guards with other employees not preventing employer agreeing to such inclusion in collective agreement - Certificate spent once collective agreement signed - Reconsideration of certification denied
- SERVICE EMPLOYEES UNION, LOCAL 204; RE DAN THERRIAN ET AL.....(Jan.) 152
- Reconsideration - First Contract Arbitration - Interest Arbitration - Timeliness - Panel refusing to reconsider direction to settle first collective agreement made by original panel - Board failing to comply with time limits in s. 40a(4) - Time limits directory only - Employer not appearing nor filing any documents - Board not bound to accept unwritten understanding as basis for contract terms - Agreement between union and related employer used as model for collective agreement
- NEPEAN ROOF TRUSS LTD.; RE CARPENTERS UNION, LOCAL 1030 (Sept.) 1287
- Reconsideration - Parties - Related Employer - Unfair Labour Practice - Whether Conrad Black and Hollinger Inc. should be added as respondents in s. 1(4) and 89 complaints - Earlier panel in *Termarg* denying addition - Whether Board will reconsider earlier decision - Board applying principle of *res judicata* - Whether those who actively control a corporate employer personally or vicariously liable - When Board will dismiss s.1(4) application before hearing respondent's evidence
- MR. GROCER, WILLETT FOODS LIMITED, C.O.B. AS, DOMGROUP LTD., HOLLINGER INC., CONRAD BLACK, ET AL.; RE R.W.D.S.U., LOCAL 414; RE TERMARG FOOD SERVICES LIMITED, ET AL.(Oct.) 1364
- Reconsideration - Representation Vote - Union waiting until ballots counted before raising allegations of employer misconduct - Discussion of circumstances when Board will entertain untimely objection to representation vote - Applicant unable to show cause why Board should reconsider its decision to dismiss certification application
- KITCHENER BEVERAGES LIMITED; RE CANADIAN UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK WORKERS; RE GROUP OF EMPLOYEES (Sept.) 1234
- Related Employer - Bargaining Unit - Pre-hearing Vote - Declaration of related employer unnecessary - Articles of Amalgamation indicating the three respondents had amalgamated - Respondents each having a collective agreement with the incumbent union - Determination of voting constituencies for pre-hearing vote - Whether ballot boxes should be sealed
- PLASTICS CMP LIMITED; RE C.A.W.-CANADA; RE CEMENT, LIME, GYPSUM & ALLIED WORKERS, A DIVISION OF THE BOILERMAKERS UNION; RE KAWARTHA MOULDING LIMITED; RE PETERBOROUGH PLASTIC PAINTERS LIMITED(Dec.) 1761

- Related Employer - Certification - Practice and Procedure - Parties to certification proceedings making joint request for related employer declaration - Affected employees entitled to notice and opportunity to be heard - Hearing unnecessary unless employees make statement of desire to make representations
- ST. JOSEPH'S HOME AND ST. JOSEPH'S HOSPITAL; RE C.U.P.E. (June) 880
- Related Employer - Charter of Rights and Freedoms - Constitutional Law - Whether related employer provision contrary to Charter - Whether Board having jurisdiction to deal with Charter argument where A.G.'s not given notice - Whether employers having standing to invoke Charter rights of employees
- F.D.V. CONSTRUCTION LIMITED ET AL; RE I.B.E.W., LOCAL 1687 (May) 617
- Related Employer - Charter of Rights and Freedoms - Interference in Trade Unions - Sale of a Business - Unfair Labour Practice - Whether reverse onus in s. 89(5) contrary to presumption of innocence in Charter - Dominion store chain changing to Mr. Grocer franchise operation - Character of business not changed to cause Board to terminate bargaining rights under s.63(5) - Difficulties in applying collective agreement not reason to terminate - Whether related employer declaration made - Decision to franchise not tainted - Hiring of employees without regard to seniority and recall rights in collective agreement unlawful
- RPKC HOLDING CORPORATION; RE RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, LOCAL 414; RE DOMINION STORES LIMITED; RE WILLETT FOODS LIMITED (June) 828
- Related Employer - Construction Industry - Purpose of s.1(4) discussed - Legal basis of bargaining rights in construction industry canvassed - Nature of work in construction industry leading to finding of related employer
- FRANK PLASTINA INVESTMENTS LTD. AND SHERWOOD VILLAGE HOMES INC. C.O.B. AS GRAND VALLEY HOMES; RE LABOURERS' UNION, LOCAL 183 (June) 720
- Related Employer - Duty to Bargain in Good Faith - Interference in Trade Unions - Remedies - Unfair Labour Practice - Nursing home contracting with outside agencies to perform house-keeping, laundry, maintenance, health care and nursing aide functions - Laying-off own employees - Whether unlawful - Whether home and outside agencies related employers - Whether bound by collective agreement - Whether control reserved by written contract relevant though not exercised - Reinstatement and back wages directed as remedy on related employer declaration - Failure to bargain with negotiating committee because of its composition unlawful
- BRANTWOOD MANOR NURSING HOMES LIMITED, MED + EXPERTS INC., HALLMARK HOUSEKEEPING SERVICES INC. ET AL; RE C.U.P.E. (Jan.) 9
- Related Employer - Evidence - Sale of a Business - Earlier panel directing respondent to produce evidence material to application - Witnesses called by respondent giving no direct evidence concerning formation of respondent - Hearsay evidence failing to comply with Board direction - Further direction to tender evidence
- SOMERVILLE BELKIN INDUSTRIES LIMITED; RE CANADIAN PAPERWORKERS' UNION, LOCALS 36, 311 AND 1112 (Sept.) 1307
- Related Employer - Jurisdictional Dispute - Union seeking related employer declaration with respect to two divisions of same employer - Related employer provision not applicable where only one entity named - Involvement of more than one union or dispute between different trades or crafts not pre-requisite to jurisdictional complaint under s. 91
- GENERAL MOTORS OF CANADA LIMITED; RE INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA AND ITS LOCAL 1971 .. (Feb.) 244

- Related Employer - Parties - Reconsideration - Unfair Labour Practice - Whether Conrad Black and Hollinger Inc. should be added as respondents in s. 1(4) and 89 complaints - Earlier panel in *Termarg* denying addition - Whether Board will reconsider earlier decision - Board applying principle of *res judicata* - Whether those who actively control a corporate employer personally or vicariously liable - When Board will dismiss s.1(4) application before hearing respondent's evidence
- MR. GROCER, WILLETT FOODS LIMITED, C.O.B. AS, DOMGROUP LTD., HOLLINGER INC., CONRAD BLACK, ET AL.; RE R.W.D.S.U. LOCAL 414; RE TERMARG FOOD SERVICES LIMITED, ET AL. (Oct.) 1364
- Related Employer - Practice and Procedure - Conditions for related employer finding clearly satisfied - Whether onus shifting to respondents to persuade Board not to exercise discretion - Delay, lack of erosion of work and circumstances of origin of bargaining rights causing Board not to exercise discretion
- CAPRICORN ACOUSTICS & DRYWALL LTD. AND J & J DRYWALL & PAINTING, A DIVISION OF SILVER CLOUD CONSTRUCTION LIMITED; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1256..... (Mar.) 308
- Remedies - Construction Industry - Duty to Bargain in Good Faith - Unfair Labour Practice - Pursuit of agreement other than provincial agreement breach of bargaining duty and s. 146(2) - Provisions of union constitution no defence against requirements of Act - Board directing inclusion of appendix in agreement
- CANADIAN PNEUMATIC CONTROL CONTRACTORS ASSOCIATION; RE THE ONTARIO PIPE TRADES COUNCIL OF U.A. AND U.A. AND THE MECHANICAL CONTRACTORS ASSOCIATION OF ONTARIO (Feb.) 209
- Remedies - Damages - Unfair Labour Practice - Victim of unfair labour practice electing to take layoff rather than work as a helper for employer at 80 per cent of a mechanic's rate - Layoff continuing three months - Whether failure to mitigate losses
- BECKETT ELEVATOR LIMITED; RE INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL 50..... (Nov.) 1493
- Remedies - Discharge for Union Activity - Employee - Interference in Trade Unions - Unfair Labour Practice - Lay-off of union supporters and promotion of union opponents motivated by anti-union reasons - Captive audience meeting unlawful - Board considering probability of lay-off for business reasons in computing compensation - Directing posting and mailing of employee notice and permission for union to conduct employee meeting during work hours - Whether working foremen managerial or confidential
- K & U MANUFACTURING LIMITED; RE UNITED STEELWORKERS OF AMERICA; RE GROUP OF EMPLOYEES..... (Jan.) 115
- Remedies - Discharge for Union Activity - Unfair Labour Practice - Pattern of anti-union conduct aimed at union supporters - Unfair labour practice complaints settled but complainant harassed and discharged a second time - Breach of ss. 64, 66 and two settlements which included a no reprisal clause - Remedies including reinstatement with full wages, posting, and order that employer provide copy of decision to all employees
- JACMORR MANUFACTURING LIMITED; RE U.F.C.W. (Dec.) 1709
- Remedies - Duty to Bargain in Good Faith - Interference in Trade Unions - Related Employer - Unfair Labour Practice - Nursing home contracting with outside agencies to perform house-keeping, laundry, maintenance, health care and nursing aide functions - Laying-off own employees - Whether unlawful - Whether home and outside agencies related employers - Whether bound by collective agreement - Whether control reserved by written contract rel-

evant though not exercised - Reinstatement and back wages directed as remedy on related employer declaration - Failure to bargain with negotiating committee because of its composition unlawful

BRANTWOOD MANOR NURSING HOMES LIMITED, MED+EXPERTS INC.,
HALLMARK HOUSEKEEPING SERVICES INC. ET AL.; RE C.U.P.E.(Jan.) 9

Related Employer - Evidence - Sale of a Business - Earlier panel directing respondent to produce evidence material to application - Witnesses called by respondent giving no direct evidence concerning formation of respondent - Hearsay evidence failing to comply with Board direction - Further direction to tender evidence

SOMERVILLE BELKIN INDUSTRIES LIMITED; RE CANADIAN PAPERWORKERS' UNION, LOCALS 36, 311 AND 1112 (Sept.) 1307

Related Employer - Jurisdictional Dispute - Union seeking related employer declaration with respect to two divisions of same employer - Related employer provision not applicable where only one entity named - Involvement of more than one union or dispute between different trades or crafts not pre-requisite to jurisdictional complaint under s.91

GENERAL MOTORS OF CANADA LIMITED; RE INTERNATIONAL UNION,
UNITED PLANT GUARD WORKERS OF AMERICA AND ITS
LOCAL 1971..... (Feb.) 244

Related Employer - Parties - Reconsideration - Unfair Labour Practice - Whether Conrad Black and Hollinger Inc. should be added as respondents in s.1(4) and 89 complaints - Earlier panel in *Termarg* denying addition - Whether Board will reconsider earlier decision - Board applying principle of *res judicata* - Whether those who actively control a corporate employer personally or vicariously liable - When Board will dismiss s.1(4) application before hearing respondent's evidence

MR. GROCER, WILLETT FOODS LIMITED, C.O.B. AS, DOMGROUPE LTD.,
HOLLINGER INC., CONRAD BLACK, ET AL.; RE R.W.D.S.U., LOCAL 414; RE
TERMARG FOOD SERVICES LIMITED, ET AL. (Oct.) 1364

Related Employer - Practice and Procedure - Conditions for related employer finding clearly satisfied - Whether onus shifting to respondents to persuade Board not to exercise discretion - Delay, lack of erosion of work and circumstances of origin of bargaining rights causing Board not to exercise discretion

CAPRICORN ACOUSTICS & DRYWALL LTD. AND J & J DRYWALL & PAINTING,
A DIVISION OF SILVER CLOUD CONSTRUCTION LIMITED; RE UNITED
BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,
LOCAL 1256.....(Mar.) 308

Related Employer - Sale of a Business - Application dismissed where no specific contract to acquire "key-man" services of an ongoing business - Key-man actually an employee in new company

TWIN ELECTRIC AND ERMAC POWER & CONTROL LTD.; RE INTERNATIONAL
BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 303 (Sept.) 1320

Related Employer - Sale of a Business - Board considering whether related employer or sale provisions applying to groups of employees of companies subjected to reorganization

SWINGLINE OF CANADA LTD. ET AL; RE UNITED STEELWORKERS OF
AMERICA (May) 689

Related Employer - Sale of a Business - Shifting of insulation bat business from unionized Millwork to non-unionized R & R - Transfer of work indicating related employers but not sale

of a business - Board deciding not to exercise discretion to make a declaration that R & R bound by collective agreement between Millwork and union

MILLWORK & BUILDING SUPPLIES LIMITED, R & R INSULATORS LIMITED;
RE TEAMSTERS UNION, LOCAL 230, READY MIX BUILDING SUPPLY,
ET AL.(Nov.)

1550

Related Employer - Unprofitable printing shop closed down - Whether newly incorporated entities common employers - Board looking beyond legal ownership to find common control or direction - Absence of employees in unit not reason to refuse declaration

McCOLLUM GRAPHICS INCORPORATED, O/A BAXTER PRESS ET AL; RE
GRAPHIC COMMUNICATIONS INTERNATIONAL UNION, LOCAL 517(Jan.)

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Remedies - Change in Working Conditions - Duty to Bargain in Good Faith - Interference in Trade Unions - Unfair Labour Practice - Employer refusing to provide information or bargain about existing or proposed salaries - Whether bad faith bargaining - Whether unilateral implementation of salary adjustments freeze violation - Whether union by-passed in communications with employees - Whether insisting on employee authorization to release salary information unlawful - Whether Board barring individual responsible for violations from participation in negotiations - Whether referring dispute to interest arbitration - Damages awarded for breach of bargaining duty - Employer directed to provide copy of Board decision to each employee

FORINTEK CANADA CORP. AND JACQUES CARETTE; RE PUBLIC SERVICE
ALLIANCE OF CANADA(Apr.)

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Remedies - Construction Industry - Duty to Bargain in Good Faith - Unfair Labour Practice - Pursuit of agreement other than provincial agreement breach of bargaining duty and s.146(2) - Provisions of union constitution no defence against requirements of Act - Board directing inclusion of appendix in agreement

CANADIAN PNEUMATIC CONTROL CONTRACTORS ASSOCIATION; RE THE
ONTARIO PIPE TRADES COUNCIL OF U.A. AND U.A. AND THE MECHANICAL
CONTRACTORS ASSOCIATION OF ONTARIO(Feb.)

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Remedies - Damages - Unfair Labour Practice - Victim of unfair labour practice electing to take layoff rather than work as a helper for employer at 80 per cent of a mechanic's rate - Layoff continuing three months - Whether failure to mitigate losses

BECKETT ELEVATOR LIMITED; RE INTERNATIONAL UNION OF ELEVATOR
CONSTRUCTORS, LOCAL 50.....(Nov.)

1493

Remedies - Discharge for Union Activity - Employee - Interference in Trade Unions - Unfair Labour Practice - Lay-off of union supporters and promotion of union opponents motivated by anti-union reasons - Captive audience meeting unlawful - Board considering probability of lay-off for business reasons in computing compensation - Directing posting and mailing of employee notice and permission for union to conduct employee meeting during work hours - Whether working foremen managerial or confidential

K & U MANUFACTURING LIMITED; RE UNITED STEELWORKERS OF AMERICA;
RE GROUP OF EMPLOYEES.....(Jan.)

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Remedies - Discharge for Union Activity - Unfair Labour Practice - Pattern of anti-union conduct aimed at union supporters - Unfair labour practice complaints settled but complainant harassed and discharged a second time - Breach of ss.64, 66 and two settlements which included a no reprisal clause - Remedies including reinstatement with full wages, posting, and order that employer provide copy of decision to all employees

JACMORR MANUFACTURING LIMITED; RE U.F.C.W.(Dec.)

1709

- Remedies - Duty of Fair Representation - Unfair Labour Practice - Company refusing to accept complainant on job site following work stoppage - Failure to give complainant opportunity to explain role in work stoppage and to inform of decision not to process grievance constituting a breach of duty - Failure to name employer in complaint - Board awarding damages for loss of opportunity to have grievance arbitrated
- RITROVATO, ANGELO; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793..... (Oct.) 1401
- Remedies - Duty of Fair Representation - Unfair Labour Practice - Grievor discharged for alleged misappropriation of company property - Failure to investigate and communicate with grievor arbitrary conduct - Arbitration with jointly selected counsel directed - Tripartite board of arbitration inappropriate - Submission of grievance to sole arbitrator ordered
- ST. PIERRE, JEANNE; RE U.A.W., LOCAL 444 AND CHRYSLER CANADA LTD. (June) 883
- Remedies - Duty of Fair Representation - Unfair Labour Practice - Union withdrawing complainant's grievance on assumption that she turned down reasonable offer of settlement by employer - Whether duty to ascertain grievor's version of events prior to acting against her interest - Reinstatement of arbitration of grievance ordered - Order not barring settlement by union in compliance with requirements of s. 68
- LIEBMAN, JEAN; RE YORK UNIVERSITY STAFF ASSOCIATION; RE YORK UNIVERSITY..... (June) 753
- Remedies - Duty to Bargain in Good Faith - Interference in Trade Unions - Related Employer - Unfair Labour Practice - Nursing home contracting with outside agencies to perform house-keeping, laundry, maintenance, health care and nursing aide functions - Laying-off own employees - Whether unlawful - Whether home and outside agencies related employers - Whether bound by collective agreement - Whether control reserved by written contract relevant though not exercised - Reinstatement and back wages directed as remedy on related employer declaration - Failure to bargain with negotiating committee because of its composition unlawful
- BRANTWOOD MANOR NURSING HOMES LIMITED, MED+EXPERTS INC., HALLMARK HOUSEKEEPING SERVICES INC. ET AL.; RE C.U.P.E. (Jan.) 9
- Remedies - Unfair Labour Practice - Prior decision finding bad faith bargaining by employer and directing that employees be provided 3 working days off with pay - Employer retroactively paying employees wages for 3 days they were on lay-off - Employer complying with Board order
- SPARTON OF CANADA LIMITED; RE U.A.W. AND ITS LOCAL 27 (Jan.) 156
- Representation Vote - Bargaining Unit - Certification - Termination - Incumbent union no longer wishing to represent unit - Whether mere existence of incumbent casting doubt on membership evidence - Board not exercising discretion to order representation vote when incumbent union no longer interested in bargaining rights and when applicant has requisite level of membership - Whether application unopposed by incumbent should be considered as a fresh certification application - Whether existing unit still appropriate
- SUNNYBROOK FOODS LIMITED; RE U.F.C.W., LOCAL 1000A (July) 1024
- Representation Vote - Certification - Practice and Procedure - Board requiring filing of fresh Form 9 declaration when membership evidence transferred from one certification application to another - Failure to file Form 9 does not prevent Board acting on "appearance" created by applications for membership cards and receipts - Failure only fatal when appli-

cation comes on for hearing - Appropriateness of conducting mail ballot in occasional teachers' constituency

HALTON ROMAN CATHOLIC SEPARATE SCHOOL BOARD; RE ONTARIO CATHOLIC OCCASIONAL TEACHERS' ASSOCIATION (July) 962

Representation Vote - Certification - Practice and Procedure - Form 9 signed "for" declarant by another individual - Whether acceptable - Proper Form 9 required to be filed at time Board determines membership support - Only appearance of support required to direct pre-hearing vote - Proper Form 9 can be filed after vote

NORTHBRIDGE PLASTICS LIMITED; RE CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT & GENERAL WORKERS (July) 1012

Representation Vote - Certification - Practice and Procedure - Individuals in voting constituency widely dispersed - Important that union able to communicate with voters - Employer directed to provide names and addresses to union and Board - *York Board of Education* principles followed

SCARBOROUGH BOARD OF EDUCATION; RE ONTARIO PUBLIC SCHOOL TEACHERS' FEDERATION (Mar.) 363

Representation Vote - Certification - Practice and Procedure - Parties to pre-hearing application agreeing to exclude "all those paid from other than operating funds" - Board questioning appropriateness of exclusion - Permitting persons to cast segregated ballots pending determination of unit after vote

OTTAWA, UNIVERSITY OF; RE CANADIAN UNION OF EDUCATIONAL WORKERS; RE THE ASSOCIATION OF PROFESSORS OF THE UNIVERSITY OF OTTAWA (Mar.) 353

Representation Vote - Certification - Practice and Procedure - Request by applicant that name be amended on certification application from Textile Workers to Laundry and Linen Workers - Request granted but representation vote ordered despite fact that membership evidence over fifty-five percent - Board canvassing instances when discretion exercised under s. 7(2) to order vote

GRUYICH SERVICES INC., A LIMITED PARTNERSHIP AND 656508 ONTARIO LIMITED; RE LAUNDRY AND LINEN DRIVERS AND INDUSTRIAL WORKERS UNION, LOCAL 847 AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; RE GROUP OF EMPLOYEES (Aug.) 1092

Representation Vote - Certification - Pre-hearing vote ordered in a constituency of occasional teachers - Whether vote should be conducted by mail

OTTAWA CATHOLIC SEPARATE SCHOOL BOARD; RE ONTARIO CATHOLIC OCCASIONAL TEACHERS' ASSOCIATION (July) 1017

Representation Vote - Charter of Rights and Freedoms - First Contract Arbitration - Termination - Application for declaration terminating bargaining rights and direction of settlement of first collective agreement by arbitration - Whether section 40a restricts freedom to contract - Whether section 7 of the Charter contravened - Whether time limits for termination applications restrict freedom of association - Parties agreeing to representation vote

EGAN VISUAL INC.; RE DANIEL BOWYER; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2679 (Aug.) 1075

Representation Vote - Reconsideration - Union waiting until ballots counted before raising allegations of employer misconduct - Discussion of circumstances when Board will entertain

untimely objection to representation vote - Applicant unable to show cause why Board should reconsider its decision to dismiss certification application

KITCHENER BEVERAGES LIMITED; RE CANADIAN UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK WORKERS; RE GROUP OF EMPLOYEES (Sept.)

1234

Sale of a Business - Charter of Rights and Freedoms - Interference in Trade Unions - Related Employer - Unfair Labour Practice - Whether reverse onus in s.89(5) contrary to presumption of innocence in Charter - Dominion store chain changing to Mr. Grocer franchise operation - Character of business not changed to cause Board to terminate bargaining rights under s.63(5) - Difficulties in applying collective agreement not reason to terminate - Whether related employer declaration made - Decision to franchise not tainted - Hiring of employees without regard to seniority and recall rights in collective agreement unlawful

RPKC HOLDING CORPORATION; RE RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, LOCAL 414; RE DOMINION STORES LIMITED; RE WILLET FOODS LIMITED (June)

828

Sale of a Business - Collective Agreement - Duty of Fair Representation - Unfair Labour Practice - A & P purchasing Dominion warehousing operation - Integrating with own operation - Union agreeing to expand A & P agreement to include Dominion employees resulting in endtailing of seniority - Whether circumvention of statutory consequence of sale unlawful - Whether Dominion agreement terminated contrary to s.52 - Whether union representing both groups having conflict of interest - Whether process followed or terms of agreement accepted constituting unfair representation of Dominion employees

GREAT ATLANTIC AND PACIFIC TEA COMPANY OF CANADA LIMITED, RETAIL, WHOLESALE & DEPARTMENT STORE UNION, LOCAL 414; RE JAMES MEIKLE ET AL; RE EDWARD JENNER AND JOHN YUILL; RE DOMINION STORES LIMITED; AND TWO OTHER FILES (Apr.)

485

Sale of a Business - Crown Transfer - Crown contracting out operation and maintenance of provincial park - Whether transfer of undertaking or merely contract out of management function - Board comparing scope of "transfer of undertaking" with "sale of business" - Finding transfer of undertaking

MINISTRY OF NATURAL RESOURCES, DANIEL DOLAN, HENRY WILSON AND THE CROWN IN THE RIGHT OF ONTARIO AS REPRESENTED BY; RE O.P.S.E.U. (Mar.)

331

Sale of a Business - Employer acquiring right to use former Safeway premises complete with furnishings, fixtures and inventory - Board canvassing decisions respecting transactions in retail food trade alleged to be sale of a business

CANADA SAFEWAY LIMITED AND CURRENT RIVER FOODS LTD.; RE U.F.C.W., LOCAL 409; RE GROUP OF EMPLOYEES.....(Nov.)

1498

Sale of a Business - Evidence - Related Employer - Earlier panel directing respondent to produce evidence material to application - Witnesses called by respondent giving no direct evidence concerning formation of respondent - Hearsay evidence failing to comply with Board direction - Further direction to tender evidence

SOMERVILLE BELKIN INDUSTRIES LIMITED; RE CANADIAN PAPERWORKERS' UNION, LOCALS 36, 311 AND 1112 (Sept.)

1307

Sale of a Business - New Dominion stores converted to A & P stores - Whether prior decision that

scope clauses be restricted to street addresses should be followed - Whether purpose of s.63 to preserve existing rights from possible future transactions

NEW DOMINION STORES INC., THE GREAT ATLANTIC & PACIFIC COMPANY OF CANADA LIMITED; RE U.F.C.W., LOCAL 175 AND 633; RE R.W.D.S.U., LOCAL 528; RE R.W.D.S.U., LOCAL 414..... (Oct.)

1378

Sale of a Business - Practice and Procedure - Union seeking intervener status having no direct interest in proceeding - Possibility that Board decision may be relied on in future proceeding not sufficient to grant intervener status - New Dominion Store converted into A & P Store through corporate re-organization - Whether sale - Whether intermingling as would cause Board to void New Dominion's agreement and direct vote - Board redefining like unit to resolve apparent conflict between two agreements

NEW DOMINION STORES INC., GREAT ATLANTIC & PACIFIC COMPANY OF CANADA LIMITED; RE U.F.C.W. LOCAL 175 AND 633; RE U.F.C.W., LOCAL 206; RE UNITED STEELWORKERS OF AMERICA..... (Apr.)

519

Sale of a Business - Related Employer - Application dismissed where no specific contract to acquire "key-man" services of an ongoing business - Key-man actually an employee in new company

TWIN ELECTRIC AND ERMAC POWER & CONTROL LTD.; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 303 (Sept.)

1320

Sale of Business - Related Employer - Board considering whether related employer or sale provisions applying to groups of employees of companies subjected to reorganization

SWINGLINE OF CANADA LTD. ET AL; RE UNITED STEELWORKERS OF AMERICA..... (May)

689

Sale of a Business - Related Employer - Shifting of insulation bat business from unionized Millwork to non-unionized R & R - Transfer of work indicating related employer but not sale of a business - Board deciding not to exercise discretion to make a declaration that R & R bound by collective agreement between Millwork and union

MILLWORK & BUILDING SUPPLIES LIMITED, R & R INSULATORS LIMITED; RE TEAMSTERS UNION, LOCAL 230, READY MIX BUILDING SUPPLY, ET AL. (Nov.)

1550

Sale of a Business - Sale of inactive shelf company not constituting transfer of a business - Board discussing purpose of s.63

LEBOVIC ENTERPRISES LTD., NORCLIFF HOMES LIMITED, WEST HILL DEVELOPMENT COMPANY LIMITED AND WEST HILL HOMES; RE LABOURERS' UNION, LOCAL 183..... (Oct.)

1342

Sale of a Business - Three Safeway stores closed - Subsequent purchase of three closed stores together with twenty-two operational stores - Purchase of closed stores separate transaction - No inventory, employees or customers transferred - Transfer of asset and not sale of business

CANADA SAFEWAY LIMITED AND THE OSHAWA FOODS DIVISION OF THE OSHAWA GROUP LIMITED; RE U.F.C.W. LOCAL 206 AND LOCAL 486..... (Mar.)

305

Sale of a Business - Unfair Labour Practice - "Taking back" by respondent project owner of management operations previously contracted out - Respondent hiring back administrative staff and other former employees of subcontractor - Whether sale of part of subcontractor's business - Whether anti-union animus relevant to a determination under s.63 - Unfair labour

practice complaint dismissed - Union not having shown anti-union motive behind respondent company's move

TORONTO COLLEGE STREET CENTRE LIMITED; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 796..... (June) 913

Sale of a Business - Unprofitable Safeway grocery store closing down - Family-owned business already operating grocery stores obtaining sub-lease of premises and purchasing equipment and fixtures - Opening ethnic oriented grocery store after hiatus of over five months - Acquisition of assets and facilities and not sale

SUPER TOPS HOLDINGS INC.; RE U.F.C.W. LOCAL 206(Jan.) 168

School Boards and Teachers Collective Negotiations Act - Duty of Fair Representation - *Labour Relations Act* not applicable to teachers - Unfair representation complaint by teacher dismissed without hearing

JOHNSON, KEN; RE O.S.S.T.F.(Jan.) 113

Sector Determination - Adjournment - Construction Industry Grievance - Jurisdictional Dispute - Practice and Procedure - Whether Board should proceed with sector determination or defer to mediation efforts of Industrial Inquiry Commissioner

WEST YORK CONSTRUCTION LTD.; RE CARPENTERS' DISTRICT COUNCIL OF TORONTO AND VICINITY, ON BEHALF OF LOCALS 27 AND 1304, CARPENTERS' UNION; RE METROPOLITAN TORONTO APARTMENT BUILDERS' ASSOCIATION; RE LABOURERS' UNION, LOCAL 183; RE THE ONTARIO FORM WORK ASSOCIATION; RE THE FORM WORK COUNCIL OF ONTARIO(Nov.) 1610

Security Guard - Employee Reference - Reconsideration - Individuals claiming to be guards and seeking exclusion from all employee collective agreement - Whether entitled to apply under section 106(2) - Prohibition against Board certifying unit including guards with other employees not preventing employer agreeing to such inclusion in collective agreement - Certificate spent once collective agreement signed - Reconsideration of certification denied

SERVICE EMPLOYEES UNION, LOCAL 204; RE DAN THERRIAN ET AL.....(Jan.) 152

Settlement - Certification - Settlement concerning status of disputed individuals not signed by objecting employees who had intervener status - Fact that objecting employees not examined by Labour Relations Officer not rendering settlement void - Final certificate revoked pending Officer meeting with employees

WINCHESTER DISTRICT MEMORIAL HOSPITAL; RE O.N.A.; RE GROUP OF EMPLOYEES (Sept.) 1323

Settlement - Duty of Fair Representation - Unfair Labour Practice - Terminated employee reinstated prior to arbitration through settlement - Settlement waived right of employee to grieve final termination - Whether employee estopped from raising legality or reasonableness of settlement - Board finding that settlement itself not illegal or unreasonable so as to constitute arbitrary, discriminatory or bad faith conduct on part of union

DURAN, UNAL; RE ONTARIO HYDRO EMPLOYEES UNION, C.U.P.E. LOCAL 1000; RE ONTARIO HYDRO(Aug.) 1068

Settlement - Practice and Procedure - Unfair Labour Practice - Prior complaint settled - Evidence on settled employer conduct allowed in subsequent complaint for limited purpose of show-

ing pattern of conduct - Whether employer required to provide reasons for discharge in reply in order to defend discharge at hearing

MAPLEHURST HOSPITAL LIMITED; RE C.L.A.C.; RE GROUP OF EMPLOYEES (Feb.) 247

Settlement - Termination - Two agreements signed by applicant, union and employer requiring representation vote and extending collective agreement - Whether applicant permitted to resile from agreements - Whether company exerted undue pressure - Board refusing to void or not give effect to agreements - Representation vote ordered - Whether costs awarded

OMSTEAD FOODS LIMITED; RE ROGER SIMPSON; RE TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION NO 880.....(Aug.) 1120

Strike - Charter of Rights and Freedoms - Duty to Bargain in Good Faith - Interference in Trade Unions - Unfair Labour Practice - Employer taking position in bargaining that striking employees would only be recalled to work in order of seniority as vacancies arose - Employer's preference for maintaining strike replacements discriminating against striking employees - Violation of ss. 15, 64 and 66 - Employer having right to raise objection to reverse onus provision in Act as being contrary to s.15 of Charter - Distinction in reverse onus provision between employers and individuals who are not employers not contrary to s.15 of Charter

SHAW-ALMEX INDUSTRIES LIMITED; RE UNITED STEELWORKERS OF AMERICA; RE GROUP OF EMPLOYEES.....(Dec.) 1800

Strike - Charter of Rights and Freedoms - Picketing - Union members refusing to cross picket line at Toronto Transit Commission job site - Whether *Transit Labour Disputes Act* violates s.2(d) of Charter - Constitutional challenge not entertained in absence of notice to Attorney General - Whether Board has jurisdiction to entertain s.89 complaint for alleged violation of *Transit Labour Disputes Act*

DOMINION PAVING LIMITED; RE LABOURERS' UNION, LOCAL 183 AND INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 AND AMALGAMATED TRANSIT UNION, LOCAL 113 AND MICHAEL REILLY ET AL. (July) 946

Strike - Construction Industry - Practice and Procedure - Application under s.135 claiming individual bargaining violated s.131 - Not properly filed under s. 135 - Single Vice-Chairman not having jurisdiction to hear

METROPOLITAN PLUMBING AND HEATING CONTRACTORS ASSOCIATION, A DIVISION OF THE MECHANICAL CONTRACTORS ASSOCIATION TORONTO; RE SEAN O'RYAN AND U.A., LOCAL 46 AND URBAN MECHANICAL CONTRACTORS LIMITED ET AL. (June) 787

Strike - Definition of "strike" in Ontario - Board reviewing remedies available to employers where unlawful strike occurs

MONARCH FINE FOODS COMPANY LIMITED; RE MILK AND BREAD DRIVERS, DAIRY EMPLOYEES, CATERERS AND ALLIED EMPLOYEES, LOCAL 647, RANDY DOVER ET AL. (May) 661

Strike - Health and Safety - Lock-out - City sanitation workers collectively refusing to wear safety vests - Work stoppage continuing for several days - Employee conduct constituting strike rather than *bona fide* refusal to work because of safety concerns - No remedial direction other than declaration of unlawful strike

TORONTO, THE CORPORATION OF THE CITY OF; RE TORONTO CIVIC EMPLOYEES UNION, LOCAL NO. 43, C.U.P.E.; RE JOHN MCLENNAN, ET AL. (Dec.) 1834

- Strike - Lock-out - Employer eliminating extended shifts to circumvent economic burden resulting from interest arbitration award unless union prepared to waive benefit in award - No loss of hours or pay for employees - No "suspension of work" within meaning of lockout definition - Whether employee responses to shift elimination constituting "strike"
- OTTAWA CIVIC HOSPITAL; RE DONNA HICKS, PRESIDENT, LOCAL 90 AND O.N.A. (June) 812
- Termination - Abandonment - Expired collective agreement containing automatic renewal clause - Union failing to give notice for renewal - Whether bargaining rights terminated - Union disorganized and in disarray - Whether bargaining rights abandoned
- PINKERTON'S OF CANADA LIMITED; RE CANADIAN GUARDS ASSOCIATION, LOCAL 114 (June) 818
- Termination - Adjournment - Evidence - Petition - Collector of petition signatures unable to attend hearing due to employer denying time off - Applicants producing note from collector indicating that signatures on petition voluntary - Note rejected as hearsay evidence - Applicants having obligation to ensure attendance of witnesses at hearing by issuing summons - Adjournment denied
- PIONEER YOUTH SERVICES LTD.; RE LYSE LEBRUN, SAMUEL (DAVID) WATSON; RE LONDON AND DISTRICT SERVICE WORKERS' UNION LOCAL 220, SERVICE EMPLOYEES INTERNATIONAL UNION (Oct.) 1389
- Termination - Adjournment - Practice and Procedure - Several s.89 complaints pending before Board - Board declining to postpone consideration of timely termination application pending disposition of earlier complaints - Whether a prior defective statement of desire will taint one subsequently filed
- NEPEAN ROOF TRUSS LTD; RE FLOYED RYAN DESCHAMPS; RE CARPENTERS UNION, LOCAL 1030 (Sept.) 1279
- Termination - Bargaining Rights - Employee - Applicant not at work on application date and not an employee - No status to bring termination application
- SMALE BROS. COMPANY LIMITED; RE MICHAEL VANLANDEGHEM; RE LABOURERS' UNION, LOCAL 1036 (July) 1019
- Termination - Bargaining Unit - Certification - Representative Vote - Incumbent union no longer wishing to represent unit - Whether mere existence of incumbent casting doubt on membership evidence - Board not exercising discretion to order representation vote when incumbent union no longer interested in bargaining rights and when applicant has requisite level of membership - Whether application unopposed by incumbent should be considered as a fresh certification application - Whether existing unit still appropriate
- SUNNYBROOK FOODS LIMITED; RE U.F.C.W., LOCAL 1000A (July) 1024
- Termination - Bargaining Unit - Construction Industry - No collective agreement covering non-ICI projects and no work performed by employees in ICI sector - Whether applicants can seek termination of bargaining rights for both the ICI and non-ICI sectors - Whether employees working in only one unit can terminate bargaining rights in other one - Effect of statutory scheme imposing province-wide bargaining in ICI sector
- FRED JANTZ MASONRY CONSTRUCTION COMPANY LIMITED; RE MICHAEL C. SZABO ET AL.; RE ONTARIO PROVINCIAL CONFERENCE OF THE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN AND THE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN, LOCAL 23.....(Aug.) 1083
- Termination - Charter of Rights and Freedoms - First Contract Arbitration - Representative Vote

- Application for declaration terminating bargaining rights and direction of settlement of first collective agreement by arbitration - Whether section 40a restricts freedom to contract
 - Whether section 7 of the Charter contravened - Whether time limits for termination applications restrict freedom of association - Parties agreeing to representation vote

EGAN VISUAL INC.; RE DANIEL BOWYER; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2679(Aug.) 1075

Termination - Collective Agreement - Timeliness - Collective agreement ratified but not signed formally by union due to discovery of typographical errors - Whether collective agreement in existence to bar termination application

SEARS CANADA INC., RE EMPLOYEES OF SEARS CANADA INC. (PETERBOROUGH); RE RETAIL, WHOLESALE & DEPARTMENT STORE UNION(Aug.) 1159

Termination - Constitutional Law - Practice and Procedure - Certification for employees of employer engaged in truck hauling business obtained by waiver of hearing - Constitutional issue not raised or considered at certification - Board faced with termination application finding employer within federal jurisdiction - No jurisdiction to entertain termination application - Reconsideration application appropriate means to raise constitutionality of certificates issued

BILL THOMPSON TRANSPORT LIMITED; RE ALLAN BERDAN ET AL; RE CANADIAN BROTHERHOOD RAILWAY, TRANSPORT AND GENERAL WORKERS(Jan.) 2

Termination - Construction Industry - Timeliness - Conflict between construction industry and general termination provisions - Whether time limits relating to conciliation and one year shelter period applicable to construction industry - Sections 57 and 61 modified by six-month period in section 123

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; RE ALAN GAGNON(Aug.) 1097

Termination - First Contract Arbitration - Employer conduct, including separation of union supporters and non-supporters, tainting termination petition - Second termination petition tainted by circumstances surrounding the first - Small inexperienced employer failing to make expeditious efforts to conclude a collective agreement - Board directing settlement of first collective agreement by arbitration

MANSOUR ROCKBOLTING LIMITED AND MANSOUR MINING EQUIPMENT SUPPLY AND REPAIR INC.; RE MICHEL LEBLANC; RE SUDBURY MINE MILL & SMELTER WORKERS UNION LOCAL 598 (Oct.) 1346

Termination - First Contract Arbitration - Termination application filed prior to s.40a becoming law - Whether s.40a to be interpreted so as to deprive employees of pre-existing legal rights - Whether union's failure to file reply fatal to challenge of termination application - Board hearing all evidence relating to both termination and first contract applications before deciding which to grant

EGAN VISUAL INC.; RE DANIEL BOWYER; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2679(Aug.) 1071

Termination - Petition - Applicant collecting separate petitions from each of 44 employees - Arranging and copying 44 sheets into single document and mailing originals to union - Board accepting single document filed where union not refuting existence of 44 separate petitions

YONGE- EGLINTON CENTRE MANAGEMENT SERVICES; RE BERYL WATTS; RE CANADIAN UNION OF OPERATING ENGINEERS & GENERAL WORKERS UNION, LOCAL 101(Jan.) 185

- Termination - Petition - Evidence led as to circulation and delivery of petition to Board - No evidence about origination and preparation - Petition rejected
- DYNASTY INN, 629809 ONTARIO LIMITED C.O.B. AS,; RE DOUG CHASE; RE HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, LOCAL 280, BEVERAGE DISPENSERS UNION(Mar.) 326
- Termination - Petition - Owner's wife part-time employee - Speaking at employees' meeting and signing petition - Wife's involvement suggesting management interest in petition - Reasonable fear of employees that management would know identity of those not signing - Board rejecting petition as involuntary
- GARDINER'S SUPERMARKET LIMITED; RE SERVICE EMPLOYEES UNION, LOCAL 183; RE OLGA YORK (June) 726
- Termination - Petition - Petition circulated by friend of member of management - Whether employee perception that petition will be disclosed to management - Whether existence of employee dissatisfaction with union relevant
- DOMUS BUILDING CLEANING CO. LTD.; RE THERESE LAFRAMBOISE AND YOLANDE PICHETTE; RE SERVICE EMPLOYEES UNION, LOCAL 219(Mar.) 319
- Termination - Petition - Practice and Procedure - Evidence before Board that termination petition not voluntary - Inquiry into voluntariness of counter-petition rendered irrelevant - Termination application dismissed
- CANADIAN PACIFIC HOTELS LIMITED (RED OAK INN); RE MIKE TALES ET AL; RE HOTEL, RESTAURANT AND CAFETERIA EMPLOYEES UNION, LOCAL 75; RE GROUP OF EMPLOYEES (Feb.) 204
- Termination - Petition - Signatures on petition consisting of first or last names only - Whether Rule 73 requiring signatures in full - Whether incomplete signatures indicating employees did not know what they were doing
- FERN BRAND WAXES LIMITED; RE THE EMPLOYEES OF FERN BRAND WAXES LTD.; RE INTERNATIONAL UNION OF ALLIED NOVELTY AND PRODUCTION WORKERS, LOCAL 905..... (Oct.) 1335
- Termination - Petition - Whether events taking place months prior to actual origination and circulation of petition relevant to issue of voluntariness - Employer conduct not tainting petition
- BELLEVILLE PLAZA; RE CRAIG SCURR; RE SERVICE EMPLOYEES UNION, LOCAL 183; RE GROUP OF EMPLOYEES..... (Sept.) 1179
- Termination - Practice and Procedure - Only one employee need exist to file termination application - Challenge to list untimely - Representation vote directed
- CITY PLUMBING (KITCHENER) LIMITED; RE RICHARD GRANDY; RE ONTARIO PIPE TRADES COUNCIL OF THE U.A., LOCAL 527 (Sept.) 1206
- Termination - Settlement - Two agreements signed by applicant, union and employer requiring representation vote and extending collective agreement - Whether applicant permitted to resile from agreements - Whether company exerted undue pressure - Board refusing to void or not give effect to agreements - Representation vote ordered - Whether costs awarded
- OMSTEAD FOODS LIMITED; RE ROGER SIMPSON; RE TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION NO. 880.....(Aug.) 1120
- Termination - Timeliness - Collective agreement having term of less than one year - Section 52(1)

- extending date of operation - Termination application not filed within last two months of term - Application dismissed as untimely
- BOUCHER'S AMHERSTVIEW SUPERMARKET; RE CINDY GALLAGHER; RE U.F.C.W. (LOCAL 175)(Nov.) 1497
- Termination - Timeliness - Union certified following three-way vote - Union immediately bound by provincial collective agreement - Termination application filed nine days later during open period of provincial collective agreement - Board exercising its discretion under section 103(2)(i) to refuse application
- R.L.D. ELECTRIC, 618830 ONTARIO LTD. C.O.B. AS; RE PETER KUNKEL; RE I.B.E.W., LOCAL 353(Aug.) 1145
- Timeliness- Arbitration - Construction Industry Grievance - Practice and Procedure - Grievor claiming retroactive room-and-board allowance - Grievance launched with considerable delay - Board applying equitable doctrine of *laches* - Grievance dismissed
- ONTARIO HYDRO - DARLINGTON G.S. AND THE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL AND L.I.U.N.A., LOCAL 597(July) 1014
- Timeliness- Collective Agreement - Termination - Collective agreement ratified but not signed formally by union due to discovery of typographical errors - Whether collective agreement in existence to bar termination application
- SEARS CANADA INC.; RE EMPLOYEES OF SEARS CANADA INC. (PETERBOROUGH); RE RETAIL, WHOLESALE & DEPARTMENT STORE UNION(Aug.) 1159
- Timeliness - Construction Industry - Termination - Conflict between construction industry and general termination provisions - Whether time limits relating to conciliation and one year shelter period applicable to construction industry - Sections 57 and 61 modified by six-month period in section 123
- INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; RE ALAN GAGNON(Aug.) 1097
- Timeliness - First Contract Arbitration - Interest Arbitration - Reconsideration - Panel refusing to reconsider direction to settle first collective agreement made by original panel - Board failing to comply with time limits in s.40a(4) - Time limits directory only - Employer not appearing nor filing any documents - Board not bound to accept unwritten understanding as basis for contract terms - Agreement between union and related employer used as model for collective agreement
- NEPEAN ROOF TRUSS LTD.; RE CARPENTERS UNION, LOCAL 1030 (Sept.) 1287
- Timeliness - Termination - Collective agreement having term of less than one year - Section 52(1) extending date of operation - Termination application not filed within last two months of term - Application dismissed as untimely
- BOUCHER'S AMHERSTVIEW SUPERMARKET; RE CINDY GALLAGHER; RE U.F.C.W. (LOCAL 175)(Nov.) 1497
- Timeliness - Termination - Union certified following three-way vote - Union immediately bound by provincial collective agreement - Termination application filed nine days later during open period of provincial collective agreement - Board exercising its discretion under section 103(2)(i) to refuse application
- R.L.D. ELECTRIC, 618830 ONTARIO LTD. C.O.B. AS; RE PETER KUNKEL; RE I.B.E.W., LOCAL 353(Aug.) 1145
- Trade Union - Certification - Trade Union Status - Whether principals exercising managerial

functions - Whether admission of persons exercising managerial functions depriving union of status - Whether occasional teachers eligible to become members - Whether sexual discrimination precluding certification - Whether Ontario Public Service School Teachers' Federation having trade union status

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Trade Union - Trade Union Status - Steps for formation of union not taken at single meeting but at separate meetings on different dates - Procedure not defective - Whether initially faulty procedure can be corrected by subsequent steps - Whether constitution discriminatory - Whether applicant having viable presence in Ontario

DUSTBANE ENTERPRISES LIMITED (DUSTBANE PRODUCTS LIMITED); RE FRATERNITE INTER-PROVINCIALE DES OUVRIERS EN ELECTRICITE (F.I.P.O.E.); RE GROUP OF EMPLOYEES (May) 607

Trade Union Status - Certification - Detailed analysis of steps taken to form a union - Union constitution permitting vessel owners to join union - Trade union need not be composed exclusively of employees - Applicant found to be trade union within meaning of s. 1(1)(p)

ETNA FOODS OF WINDSOR LIMITED; RE GREAT LAKES FISHERMEN AND ALLIED WORKERS' UNION; RE KINGVILLE FISHERMEN'S COMPANY LTD.; RE U.F.C.W.; RE LAKE ERIE FOODS INC.; RE GROUP OF EMPLOYEES; RE NORTHSORE FISHERY INC. (June) 710

Trade Union Status - Certification - Membership Evidence - Employees endorsing motion confirming constitution of association - Motion confirming membership only for those employees who supported motion and who had previously applied for membership - Applicant filing documents subsequent to terminal date on behalf of employees confirming membership - Documents not given any weight because signed subsequent to terminal date

VME EQUIPMENT OF CANADA LTD.; RE EMPLOYEES' ASSOCIATION OF EUCLID (V.M.E.)..... (Oct.) 1480

Trade Union Status - Certification - Trade Union - Whether principals exercising managerial functions - Whether admission of persons exercising managerial functions depriving union of status - Whether occasional teachers eligible to become members - Whether sexual discrimination precluding certification - Whether Ontario Public School Teachers' Federation having trade union status

WINDSOR, THE BOARD OF EDUCATION FOR THE CITY OF; RE ONTARIO PUBLIC SCHOOL TEACHERS' FEDERATION(Mar.) 378

Trade Union Status - Certification - Union Successor Status - Whether merger of two international unions causing local to lose its status as a trade union - Applicant not entitled to presumption of status unless name identical with name used in previous proceeding - Use of name other than legal name not fatal to proof of status

HARTLEY GIBSON COMPANY LIMITED; RE TORONTO PRINTING PRESSMEN & ASSISTANTS' UNION LOCAL 10, SUBORDINATE TO G.C.I.U.(Nov.) 1517

Trade Union Status - Trade Union - Steps for formation of union not taken at single meeting but at separate meetings on different dates - Procedure not defective - Whether initially faulty procedure can be corrected by subsequent steps - Whether constitution discriminatory - Whether applicant having viable presence in Ontario

DUSTBANE ENTERPRISES LIMITED (DUSTBANE PRODUCTS LIMITED); RE FRATERNITE INTER-PROVINCIALE DES OUVRIERS EN ELECTRICITE (F.I.P.O.E.); RE GROUP OF EMPLOYEES (May) 607

- Unfair Labour Practice - Adjournment - Practice and Procedure - Complaint relating to bargaining between employer and union - Employees only incidentally affected - Employees not entitled to notice - Request for adjournment to facilitate notice refused
- MARKS LUMBER LTD.; RE INTERNATIONAL WOODWORKERS OF AMERICA (July) 1004
- Unfair Labour Practice - Arbitration - Collective Agreement - Practice and Procedure- Foremen performing bargaining unit work - Union arguing violation of s.50 of the Act - Whether matter proper for Board consideration - Board finding matter to be one of contract application and interpretation classically dealt with by arbitrators - Board deferring matter to arbitration
- LLOYD-TRUAX LIMITED WINGHAM; RE CARPENTERS UNION, LOCAL 3054..... (July) 994
- Unfair Labour Practice - Arbitration - Interference in Trade Unions - Practice and Procedure - Union requesting copies of master plan provided by collective agreement - Employer refusing copies but permitting review of copy in company downtown office - Constituting interference - Not deferring to arbitration
- FORD GLASS LIMITED; RE ALUMINUM, BRICK AND GLASS WORKERS INTERNATIONAL UNION, LOCAL 204 (May) 624
- Unfair Labour Practice - Bargaining Rights - Certification Where Act Contravened - Collective Agreement - Interference in Trade Unions - Rubber plant moving from Quebec to Ontario without advance notice to union - Quebec employees terminated and not re-hired at new location - Whether plant relocation and hiring practices tainted by anti-union motive - Whether bargaining rights having extra-territorial effect - Whether collective agreement binding outside Quebec
- SERVAAS RUBBER COMPANY INC.; RE LE SYNDICAT DES EMPLOYES DE SER VAAS (CSN); RE R.W.D.S.U.; RE LA COMPAGNIE DE CAOUTCHOUC SERVAAS INC. AND REAL LAUZON (Dec.) 1780
- Unfair Labour Practice - Certification - Applicant requesting s.8 certification for full-time bargaining unit after lost representation vote - Settlement reached on s.89 complaint - Board concluding first vote influenced by unfair labour practices - Whether new vote should be ordered or applicant certified outright - Whether true wishes likely to be entertained in representation vote - Settlement not enough to "restore the atmosphere" - Board exercising discretion to certify pursuant to s.8
- MAPLEHURST HOSPITAL LIMITED; RE C.L.A.C.; RE GROUP OF EMPLOYEES (July) 996
- Unfair Labour Practice - Certification Where Act Contravened - Discharge for Union Activity - Employees discharged during organizing campaign - Whether anti-union animus - Whether conditions for certification without vote satisfied
- MOREWOOD INDUSTRIES LIMITED; RE CARPENTERS UNION, GENERAL WORKERS LOCAL 1030 (Mar.) 346
- Unfair Labour Practice - Certification Where Act Contravened - Interference in Trade Unions - Staff reduction "experiment" imposed by employer - Staff meetings held to explain effects of unionization - Respondent going beyond freedom of expression reserved to employer - Staff reductions linked to unionization - Union certified under s.8
- AURORA RESTHAVEN EXTENDED CARE & CONVALESCENT CENTRE, CEBY MANAGEMENT LIMITED OPERATING AS; RE C.L.A.C.; RE GROUP OF EMPLOYEES (Aug.) 1031

- Unfair Labour Practice - Change in Working Conditions - Downgrading of employee evaluation and failure to give usual wage adjustments - Board applying "reasonable expectation" test - Finding violation - Downgrading result of grievor's union activities
- W.H. SMITH CANADA LTD.; RE CANADIAN PAPERWORKERS' UNION ... (June) 920
- Unfair Labour Practice - Change in Working Conditions - Duty to Bargain in Good Faith - Interference in Trade Unions - Remedies - Employer refusing to provide information or bargain about existing or proposed salaries - Whether bad faith bargaining - Whether unilateral implementation of salary adjustments freeze violation - Whether union bypassed in communications with employees - Whether insisting on employee authorization to release salary information unlawful - Whether Board barring individual responsible for violations from participation in negotiations - Whether referring dispute to interest arbitration - Damages awarded for breach of bargaining duty - Employer directed to provide copy of Board decision to each employee
- FORINTEK CANADA CORP. AND JACQUES CARETTE; RE PUBLIC SERVICE ALLIANCE OF CANADA (Apr.) 453
- Unfair Labour Practice - Change in Working Conditions - Hospital Labour Disputes Arbitration Act - History of incorrect payment for statutory holidays under collective agreement - Employer correcting error during freeze period - History constituting privilege and prevailing over term in agreement
- ETOBICOKE GENERAL HOSPITAL; RE ASSOCIATION OF ALLIED HEALTH PROFESSIONALS, ONTARIO (May) 614
- Unfair Labour Practice - Charter of Rights and Freedoms - Collective Agreement - Discharge of employee for failure to comply with collective agreement union shop clause - Employer and union not violating Act by enforcing union membership clause in collective agreement - Union security clause not violating Charter
- CARLTON CARDS LTD., C.P.U., DIETER PLAUTZ ET AL.; RE LESLIE A. MANDERS (Dec.) 1673
- Unfair Labour Practice - Charter of Rights and Freedoms - Duty to Bargain in Good Faith - Interference in Trade Unions - Strike - Employer taking position in bargaining that striking employees would only be recalled to work in order of seniority as vacancies arose - Employer's preference for maintaining strike replacements discriminating against striking employees - Violation of ss. 15, 64 and 66 - Employer having right to raise objection to reverse onus provision in Act as being contrary to s.15 of Charter - Distinction in reverse onus provision between employers and individuals who are not employers not contrary to s.15 of Charter
- SHAW-ALMEX INDUSTRIES LIMITED; RE UNITED STEELWORKERS OF AMERICA; RE GROUP OF EMPLOYEES..... (Dec.) 1800
- Unfair Labour Practice - Charter of Rights and Freedoms - Interference in Trade Unions - Related Employer - Sale of a Business - Whether reverse onus in s.89(5) contrary to presumption of innocence in Charter - Dominion store chain changing to Mr. Grocer franchise operation - Character of business not changed to cause Board to terminate bargaining rights under s.63(5) - Difficulties in applying collective agreement not reason to terminate - Whether related employer declaration made - Decision to franchise not tainted - Hiring of employees without regard to seniority and recall rights in collective agreement unlawful
- RPKC HOLDING CORPORATION; RE RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, LOCAL 414; RE DOMINION STORES LIMITED; RE WILLET FOODS LIMITED (June) 828
- Unfair Labour Practice - Collective Agreement - Duty of Fair Representation - Sale of a Business

- A & P purchasing Dominion warehousing operation - Intergrating with own operation - Union agreeing to expand A & P agreement to include Dominion employees resulting in entailing of seniority - Whether circumvention of statutory consequence of sale unlawful - Whether Dominion agreement terminated contrary to s.52 - Whether union representing both groups having conflict of interest - Whether process followed or terms of agreement accepted constituting unfair representation of Dominion employees

GREAT ATLANTIC AND PACIFIC TEA COMPANY OF CANADA LIMITED, RETAIL, WHOLESALE & DEPARTMENT STORE UNION, LOCAL 414; RE JAMES MEIKLE ET AL; RE EDWARD JENNER AND JOHN YUILL; RE DOMINION STORES LIMITED; AND TWO OTHER FILES (Apr.)

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Unfair Labour Practice - Colleges Collective Bargaining Act - Duty of Fair Representation - Financial Statements - Local union membership policy not to provide financial statement to employees - Employee permitted access to financial information - Access to information not adequate for purposes of Act - Union donation of funds to other organizations contrary to union constitution not breach of duty of fair representation - Purely internal union matter

STUART, A.K.; RE O.P.S.E.U., LOCAL 560 (July)

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Unfair Labour Practice - Colleges Collective Bargaining Act - Intimidation and Coercion - Cancellation of courses taught by full-time faculty in extension program during legal strike not tainted by anti-union motive - Absence of reverse onus in CCBA

CAMBRIAN COLLEGE OF APPLIED ARTS AND TECHNOLOGY; RE O.P.S.E.U. (Sept.)

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Unfair Labour Practice - Construction Industry - Duty to Bargain in Good Faith - Pursuit of agreement other than provincial agreement breach of bargaining duty and s. 146(2) - Provisions of union constitution no defence against requirements of Act - Board directing inclusion of appendix in agreement

CANADIAN PNEUMATIC CONTROL CONTRACTORS ASSOCIATION; RE THE ONTARIO PIPE TRADES COUNCIL OF U.A. AND U.A. AND THE MECHANICAL CONTRACTORS ASSOCIATION OF ONTARIO (Feb.)

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Unfair Labour Practice - Damages - Duty of Fair Referral - Whether formula in *Portiss* to be used to quantify damages flowing from s.69 breach - Complainants would have fared better than average union member but for s.69 breach - *Portiss* formula modified to reflect circumstances of case

D'ALESSANDRO, LUCIANO AND DONATO MARINARO; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1089 AND ROCCO D'ANDREA (Aug.)

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Unfair Labour Practice - Damages - Remedies - Victim of unfair labour practice electing to take layoff rather than work as a helper for employer at 80 per cent of a mechanic's rate - Layoff continuing three months - Whether failure to mitigate losses

BECKETT ELEVATOR LIMITED; RE INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL 50 (Nov.)

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Unfair Labour Practice - Discharge for Union Activity - Chief union organizer discharged on day of certification hearing - Organizer terminated solely for his threatening behavior and racist remarks - Complaint dismissed

OLYMPIA FLOOR & WALL TILE CO., OLYMPIA & YORK DEVELOPMENTS LIMITED C.O.B. AS, AND JOE SCHOCHET; RE LABOURERS' UNION, LOCAL 183 (Dec.)

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Unfair Labour Practice - Discharge for Union Activity - Duty to Bargain in Good Faith -

Whether grievor discharged for picket line misconduct - Whether discharge for union activity - Whether failure to reinstate pursuant to no reprisals clause in settlement bad faith bargaining

PRE FAB CUSHIONING PRODUCTS LTD.; RE U.E. (Feb.) 273

Unfair Labour Practice - Discharge for Union Activity - Employee - Interference in Trade Unions - Remedies - Lay-off of union supporters and promotion of union opponents motivated by anti-union reasons - Captive audience meeting unlawful - Board considering probability of lay-off for business reasons in computing compensation - Directing posting and mailing of employee notice and permission for union to conduct employee meeting during work hours - Whether working foremen managerial or confidential

K & U MANUFACTURING LIMITED; RE UNITED STEELWORKERS OF AMERICA; RE GROUP OF EMPLOYEES..... (Jan.) 115

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JACMORR MANUFACTURING LIMITED; RE U.F.C.W. (Dec.) 1709

Unfair Labour Practice - Duty of Fair Referral - Referrals made as per usual practice re appointment of stewards - Not unlawful though resulting in referral of persons not at top of out-of-work list - Departures from ordinary rules not unlawful in circumstances - Referral duty not giving Board power to arbitrate what rules should govern hiring hall

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Unfair Labour Practice - Duty of Fair Referral - Union adopting policy of refusing name hires following pre-job conference - Depriving complainant of job opportunities - Whether union action arbitrary, discriminatory or in bad faith

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Unfair Labour Practice - Duty of Fair Representation - Agreement between Dominion Stores and union relating to proposed lay-offs of warehouse employees - Laid-off employees' grievances not taken to arbitration by union - Union's decision based on refusal to disturb agreement - Whether breach of duty of fair representation - Whether union's decision not to take a bad faith bargaining complaint against employer amounting to breach of duty - Whether union breached duty by not letting complainant-steward represent group of grievors on his own

DICOGNITO, ROCCO ET AL.; RE RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, LOCAL 414 ET AL. AND DOMINION STORES LIMITED (July) 938

Unfair Labour Practice - Duty of Fair Representation - Complainants discharged from maintenance staff of school board following criminal conviction - Union refusing to proceed to arbi-

- tration - Union failure to advise complainants of five day time limit for filing grievances not a breach of duty
- MEDEIROS, TONY AND JOE DACOSTA, RE; RE C.U.P.E., LOCAL 1479(Nov.) 1541
- Unfair Labour Practice - Duty of Fair Representation - Employer agreeing to accept seniority grievance of complainant but only on condition union would not grieve on behalf of any other employees moved down on seniority list as a result - Union refusing to pursue grievance on this condition - Whether union balanced interests of complainant and other members of bargaining unit
- KONKLE, PATTY, RE; RE TRIDON EMPLOYEES' UNION(Nov.) 1533
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